Supreme Court, U.S.
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No. 06- 06-438

IN THE

Supreme Court of the United States

SHELBY S., a minor by and through her Conservator and next friend, KATHLEEN T.,

Petitioners,

v.

CONROE INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CAREN MORGAN CAMBRE
1300 Jefferson Street
Gretna, LA 70053
(504) 251-4359

MARTIN J. CIRKIEL
Counsel of Record
CIRKIEL & ASSOCIATES, P.C.
1901 East Palm Valley Boulevard
Round Rock, TX 78664
(512) 244-6658

Attorneys for Petitioners

203588

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Under the Individuals With Disabilities Education Act ("IDEA"), when a local school district wants to administer a medical examination that is potentially life-threatening to a child, and the parent[1] denies consent, the school district may bring the disagreement before an administrative hearing officer for a resolution. Pursuant to *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176 (5th Cir. 1995), the Hearing Officer, as well as the District Court, has no authority but to grant such a request because the school district has an absolute right to evaluate thereunder. The Fifth Circuit Court of Appeals has confirmed *Andress* but did clarify that the school must articulate a reasonable basis. Petitioners disagree and respectfully believe that to overrule the parent's fundamental rights, the school's request and interest must be compelling and not merely reasonable and further, that the action requested must meet the least restrictive means test of achieving the desired goal. Further, in addition and in a related vein, the Fifth Circuit Court of Appeals stated that a child is free to decline special education services rather than submit to a requested medical evaluation.

As such, Petitioners pose the following query:

1. Is the correct standard of review a school district must meet to override a denial of parental consent and compel a child to undergo a medical examination that is potentially life-threatening, merely "the articulation of

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1. In the instant cause, Kathleen T. is the natural grandmother and legal conservator of Shelby S. Petitioners use the term "parent," generically to include any person, pursuant to IDEA who has the authority to provide or withhold consent. *See also,* 34 C.F.R § 300.20 (ex., a natural or adoptive parent, a guardian, a person acting in the place of a parent [i.e., grandparent or any person legally responsible], foster parent or surrogate parent [34 C.F.R. 300.15]).

reasonable grounds" as the Fifth Circuit has established, or must it be of a compelling interest, and meet the least restrictive means test as is consistent with well-settled Supreme Court jurisprudence when construing issues relative to fundamental parental rights?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, a student with a disability and her paternal grandmother and legal managing conservator, respectfully petition the Court for a Writ of Certiorari to review the judgment of the Court Of Appeals, which affirmed the lower court ruling (and administrative hearing officer decision), that when a school desires to have their own physician perform a medical evaluation on a child who is medically fragile, and the parent refuses to give consent, the school has an absolute right to have a physician of their choice complete a medical evaluation of a child, even if such evaluation could be life-threatening, as long as the school articulated reasonable grounds for the necessity of the evaluation.

OPINIONS BELOW

There are three (3) opinions below; culminating in the Court Of Appeals ruling that is the subject of this petition. In chronological order they are as follows.

1. On July 9, 2003 the Honorable Stephen Webb, A Texas Education Agency Hearing Officer determined that he had absolutely no discretion to rule otherwise and that the Conroe Independent School District ("the school district" or alternatively "Conroe ISD") had an absolute right to have their own physician examine Shelby, relying upon the holding and language set out in *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176 (5th Cir. 1995). This unpublished opinion by the Hearing Officer is reprinted in the Appendix at App. C.

2. Petitioners appealed this decision to the United States District Court For The Southern District Of Texas, Houston Division, adding *inter alia,* certain constitutional claims. The Respondent in that cause, Conroe ISD filed a *First Amended Motion To Dismiss or Alternatively For Summary Judgment*, which was granted on June 10, 2004, by the Honorable Ewing Werlein, Jr., Judge. The Motion essentially affirmed the underlying decision by the Hearing

Officer and *Andress*; i.e., that pursuant to Fifth Circuit jurisprudence the Hearing Officer had absolutely no discretion but to grant the request of the school district. Petitioners filed a Motion For Rehearing arguing that the Court failed to adequately consider 1997 changes to IDEA when reviewing *Andress* and further, that the Court affixed the incorrect burden of proof and standard of review on the issue of informed consent. This request too was denied. This unpublished opinion is reprinted in the Appendix at App. B.

3. Petitioners appealed the District Court decision to the United States Court Of Appeals For the Fifth Circuit arguing that a school district should not have an absolute right to evaluate a child, but rather that a Hearing Officer should in fact have the discretion to determine whether or not such medical evaluation was in fact necessary. In short, that the absolute rule espoused in *Andress* was no longer good law, based upon the 1997 changes to IDEA, or in the alternative was inapplicable as to Shelby. Petitioners further argued that allowing a medical evaluation without a parent's consent violated constitutional protections. Without addressing *Andress,* on June 26, 2006 the Court affirmed the lower court's confirmation of the Hearing Officer decision. The panel noted and clarified that the school's request to submit a child to a medical evaluation and over-ride parental consent, the school had to "articulate reasonable grounds" for its necessity. In addition, the Court of Appeals noted the school district's reevaluation of the student was not constitutionally problematic as she was free to decline special education under IDEA rather than submit to the district's medical evaluation. *See Shelby S. by next friend Kathleen T. v. Conroe Indep. Sch. Dist.*, 454 F.3d 450 (5th Cir. 2006). This published opinion is reprinted in the Appendix at App. A.

STATEMENT OF THE JURISDICTION

The panel decision of the Court of Appeals was entered on July 26, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS AFFECTED

This case arises under the due process clause of the Fourteenth Amendment to the United States Constitution.

In addition, this case arises under the Individuals With Disability Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, *see also* 34 C.F.R. § 300.507(b); 19 TEX. ADMIN. CODE § 89.1151(b). Importantly, IDEA is silent on the proper standard a hearing officer must use when a school wants to overcome a parent's denial of consent to a potentially life-threatening medical evaluation.

STATEMENT OF THE CASE

Under the IDEA, Congress provides financial resources to the States and then onto the various political subdivisions to "ensure that all children with disabilities have available to them a free appropriate public education ("FAPE") including special education and related services designed to meet their unique and individual needs." 20 U.S.C. § 1400(d)(1)(A), and further, to protect the rights of children with disabilities and their parents, 20 U.S.C. § 1400(d)(1)(B). These monies are not unfettered, as the school has a duty to abide by certain procedural and substantive standards when developing individualized education programs ("IEP") for children with disabilities. These duties and procedural safeguards are nowhere more relevant than when the school and parent disagree as to whether or not a medical evaluation is required for a child who may be injured by the very medical evaluation the school proposes.

In this Court's last setting it adjudicated *Shaffer v. Wheat*, 126 S. Ct. 528, 163 L. Ed. 2d 387, 2005 LEXIS 8554 (2005) holding that the burden of persuasion in an administrative hearing challenging the appropriateness of an IEP, is properly placed upon the party seeking relief, whether it be the school or the parent.

While IDEA makes numerous and significant references to educational evaluations in general, 20 U.S.C. § 1412(A)(6)(b) and § 1414(b)(2) and (3), the references to medical evaluations in IDEA are much more limited, 20 U.S.C. § 1401(22), and only to address medical evaluations for diagnostic purposes. There is citation regarding when evaluations and reevaluations may be required or otherwise deemed necessary, 20 U.S.C. § 1414(b)(4) and (5), (c)(5), and other related areas regarding consent, 20 U.S.C. § 1415(b)(3); 1414(a)(1)(C) and (c)(3), but IDEA is silent on what standards an impartial hearing officer must use, when determining whether or not the requested medical evaluation satisfies constitutional muster.

In short, when a school seeks to have their own physician perform a medical evaluation of a child and the parent denies consent, must the request be merely the articulation of reasonable grounds, or must the school demonstrate a compelling reason to overcome the parent's fundamental right to control their child's medical care?

FACTUAL AND PROCEDURAL RESUME

ABOUT SHELBY S.

Shelby was born with SIDS, apnea, failure to thrive, Pierre Robin syndrome, a partial cleft palate, chronic otitis medias, and autonomic dysfunction[2] with bardycardia and tachycardia.

2. The autonomic nervous system is concerned with the involuntary control of body functions. It regulates the function of the glands (especially the salivary, gastric, and sweat glands), smooth muscle tissue, and the heart. The autonomic nervous system may act to reduce or slow activity or even to initiate its function.

This autonomic dysfunction (also known as Dysautonomia) is the controlling diagnosis for Shelby. It is an Autonomic Nervous System Dysfunction.[3] Sometime during her first months of life Shelby was referred by the University of Texas Medical Branch ("UTMB") to the Southwest SIDS Research Institute where Dorothy Kelly, M.D., also Associate Director of the facility and on staff at UTMB, became her treating physician.[4]

As Shelby's natural parents were not able to successfully deal with these medical issues and had separated, they sought assistance from Kathleen T., who then became more involved in her granddaughter's life and was eventually given legal custody. Shelby wore a heart and lung monitor until she was almost five (5) years old with a special one hundred (100) decibel alarm. When she stopped breathing and/or her heart stopped beating, the alarm would go off. This occurred frequently during her early years, both during the day and night. Shelby also suffered from apnea, which was exacerbated and triggered even by slight changes in the temperature. In addition, Shelby required feeding every two (2) hours and medication at least every four (4) hours. With Dr. Kelly's direction and Ms. T.'s diligence Shelby began to gain weight and prosper.

However, her medical regimen was replete with peril. Shelby evidenced a sensory integration disorder and was extremely tactile defensive. This is a condition that required treatment personnel to receive special training so that they could

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3. There are two (2) accepted types of Dysautonomia, Familial Dysautonomia and Autonomic Nervous System Dysfunction. Familial Dysautonomia is a subcategory that is genetically inherited by a particular group of members of the Jewish genotypes. As such, its treatment is vastly different than that of the type Shelby experiences.

4. Dr. Kelly is one of only a few specialists in the United States who treat Pediatric Autonomic Nervous System Dysfunction. She is a pediatric pulminologist and a specialist in treating Shelby's disorder. She currently treats about thirty (30) to thirty-five (35) patients who are challenged by this type of Dysautonomia, and since 1975 she has treated hundreds of such cases. She does not treat Familial Dysautonomia.

touch Shelby without leaving her screaming in pain and fear. It required great sensitivity so as to be able to provide therapy in a manner in which Shelby could receive necessary sensory input without going into cardiac arrest. In addition, sudden sounds could throw her into convulsions and also into cardiac arrest. To avoid this problem her therapeutic regimen also included music therapy, touch therapy, and other forms of integrated techniques personalized for Shelby, so as to maintain strict environmental control.

Ms. T. reports that Shelby has gone into cardiac arrest on numerous occasions. Importantly, CPR is ineffective for Shelby during these moments because it is not her heart that malfunctions but rather something in her brain. As a treatment regimen Dr. Kelly has prescribed Belladonna, an effective plant elixir, but Belladonna is also extremely dangerous. Nevertheless, because it is the only known effective medication for Shelby, it must be used. However, if it is used too frequently, her body will become accustomed to it and thereby the Belladonna will lose its effectiveness. In short, Belladonna is the only known treatment, and while it saves Shelby's life for the moment, it has the unfortunate consequence of diminished effectiveness over long-term use and thereby may contribute to a shortened life expectancy. For this reason, preventing any triggering incident is of utmost importance.

Specifically, Shelby's providers must control stressful conditions, ensure that she does not experience fatigue, and not permit her to get into any heightened emotional state. Most importantly, the room temperature must be maintained at less than seventy-two degrees Fahrenheit (72°F) or else Shelby will become overheated and begin the stress process of Dysautonomic crisis, which can lead to heat stroke or heat exhaustion, then shock, and then cardiac arrest. During a Dysautonomic crisis, Shelby's sensory integration problems surface and worsen as do her central auditory processing problems. When Shelby goes into heat stroke or exhaustion,

she becomes very confused, combative, and hostile; is not aware of herself, others, or her surroundings; and may try to run away due to her extreme anxiety, fear and disorientation. Uneducated efforts to verbally or physically intervene may increase symptoms and make it more likely that the very thing everyone is trying to avoid, i.e., potential cardiac arrest and overuse of the Belladonna.

The manifestation of the above-described symptoms of Shelby's illness results from "triggers," which are unique and individualized as to each child. There is no textbook treatment, no "one size fits all;" each child must be individually observed. Nevertheless, these triggers, with keen observation and a strong sense of commitment by the physician and the care giver, can be learned and classified. As such, one can watch for the triggers, prevent a health emergency and acute medical problems can be averted.

Any care giver must have a working and ongoing relationship with Kathleen T. and Dr. Kelly, must have known Shelby for a sufficient period of time, must receive training regarding her medical issues and be able to recognize indicators of the beginning of a crisis. If a crisis occurs, there are many treatment possibilities, ranging from immediately removing the stressful event to using cool wet towels to cool down the body to administering Belladonna. In situations where there is a decrease in cardiac output, the care giver will have as little as thirty (30) seconds to administer the drug, so a failure to recognize and/or treat a crisis immediately could result in Shelby's death.

The best, and essentially the only, possible care for Shelby is controlling her environment and detecting early the signals of an oncoming attack, thereby avoiding the symptoms of crisis, the need for Belladonna and the lingering effects of the crisis. If a crisis does occur, Shelby's care requires immediate administration of the proper and least dramatic treatment. Not surprisingly, it is absolutely uncontroverted that Shelby's

grandmother, Ms. T., is the person most aware of these signals and treatments and is most capable of teaching them to others. In fact, Dr. Kelly issued a physician order that Shelby's grandmother stay with her until another person could be trained to recognize Shelby's essential cues and also to provide related interventions if ever they would become necessary.

SHELBY STARTS SCHOOL

For Kindergarten in the 2000-2001 school year and first grade in the 2001-2002 school year, Dr. Kelly wrote letters with physician orders to the school requiring, among other things, that Shelby be kept in a temperature controlled environment, that the Belladonna be kept readily accessible, that Shelby be under the direct supervision of Kathleen T. or a care giver designated by her, and that certain medical procedures be provided when Shelby was at school. At the ARD (Admission, Review & Discharge) Committee meetings, the school incorporated these orders into Shelby's IEP ("Individualized Educational Plan") whereby she received homebound services and occasional socialization visits to the school campus. These visits went reasonably well except for the time Shelby was bitten by a copperhead snake on the playground and another occasion where Shelby was hospitalized for about a week.

Prior to Shelby's entrance into second grade in August of 2002, Dr. Kelly sent a letter with physician orders to Conroe ISD, reiterating the importance of following the previous orders in exactitude, including and most relevant to this cause, that Shelby be in a physical plant where the temperature was within 72-74 degrees, that Shelby have an aide in the classroom skilled in responding to emergencies for a child with Dysautonmia and that the medication be readily accessible. The good doctor noted that:

> "There is no circumstance in which Shelby's doctor's orders can safely be disobeyed or ignored. Failures of the nervous autonomic system can be fatal in some

circumstances. It is our job to ensure those circumstances do not occur."

Shelby's ARD committee met on August 16, 2002, and reviewed her Full Individual Re-Evaluation including Dr. Kelly's physician's orders and wrote her IEP. Until such time as the school could train someone to assure Shelby's safety, Dr. Kelly specifically re-issued her physician order that Shelby's grandmother accompany her to school.

Ms. T. was very concerned that the temperature in the classrooms was not being controlled, that the required medication was not available and that there was no one in the class room skilled in serving Shelby. She attempted to deal with her concerns by first speaking with the school principal, but the principal failed to respond satisfactorily. Ms. T. then wrote a complaint to the school board, alleging that because the school could not assure that the temperature issue was addressed as required by physician orders, Shelby's rights pursuant to the Americans With Disabilities Act were being violated. Shortly thereafter the school principal, Doris Phelps, issued a directive, which was delivered to Ms. T's home by a police officer, that if Ms. T. returned to the campus with Shelby, she would be arrested and forcibly removed from the school campus.

Now threatened with arrest and believing the school could no longer keep her child safe or follow physician orders, Ms. T. removed Shelby from school, pending a resolution of the disagreement.

Ms. T. attempted to resolve the dispute, which essentially boiled down to disagreements over the temperature, availability of necessary medications and Dr. Kelly's order that required a person trained in Shelby's cues and treatments to remain with her constantly. At that time the only person so trained was Shelby's grandmother, Ms. T. It was reasonably believed that she only had to remain in the classroom to train Conroe ISD personnel for only about two weeks.

The school refused. The antagonism grew. The school threatened action in criminal court for truancy and that Petitioner was violating state compulsory school attendance requirements. In November 2002, Ms. T. filed a suit in federal court against various school officials alleging, *inter alia,* that Shelby's rights pursuant to the Americans With Disability Act, the Fifth and Fourteenth Amendments were being violated. Shortly thereafter the school did file truancy charges.

THE ADMINISTRATIVE DECISION

While the federal suit was pending against the school, Conroe ISD filed a request for a Due Process hearing with the Texas Education Agency, so as to order Ms. T. to permit Conroe ISD to perform its own medical evaluation, notwithstanding the availability of already existing detailed medical reports and orders from Dr. Kelly. (App. C at 33a-35a) Conroe ISD represented that it wanted the authority to perform its own medical evaluation merely to determine the extent to which Shelby required "related services."[5] Further, Conroe ISD argued it had an absolute right to have its own physician assess Shelby, relying on *Andress v. Cleveland Independent School District,* 64 F.3d 176 (5th Cir. 1995). (App. C at 35a)

The administrative due process hearing was held on June 5 and 6, 2003. Conroe ISD argued that it could and should provide Shelby all the services she required to receive a free appropriate education (FAPE) and that Shelby's guardian, Kathleen T., did not need to be present in the classroom in order for it to do so. Respondent also argued that the medical evaluation sought was not only necessary but mandated by IDEA. (App. C at 35a)

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5. Related services are rather broad but in the instant case could include, but not be limited to, counseling, medical services, occupational and physical therapies, parent counseling and training, psychological services, recreation, rehabilitation, school health services, social work services, and transportation. 20 U.S.C. §1401(22); 34 C.F.R. §300.24.

Petitioners argued that Respondent failed to provide appropriate notice and informed consent regarding the February 18, 2003 request for a medical evaluation, that Respondent failed to provide Shelby with appropriate support services in light of her medical fragility, that Respondent had denied Shelby access to her education by failing to follow physician orders that required she be continuously observed by a care taker familiar with her medical condition and that Respondent should not be allowed to subject Shelby to another intrusive medical examination when there was a perfectly legitimate, current, medical evaluation in existence by a recognized medical expert. (App. C at 35a)

Petitioners also argued that Respondent was not authorized by state or federal law to conduct a medical evaluation on Shelby over the objections of her parent. Finally, Petitioners argued that *Andress* only permitted a school district to require a medical examination without familial consent for an initial evaluation or for a three-year reevaluation. Since Respondent had already found Shelby eligible for special education and related services based upon Dr. Kelly's diagnosis and correspondence, *Andress* did not apply. (App. C at 35a)

At the hearing the school district offered the testimony of child neurologist Gary Clark, M.D. as that of an expert skilled in treating Dysautonomia, and attempted to establish his qualifications to perform the requested evaluation without harming Shelby. Counsel for Shelby and Ms. T., however, elicited testimony from Dr. Clark himself which, especially when combined with other evidence available to the hearing officer, showed that the requested examination of Shelby was likely to cause her serious harm, and in any case may have been altogether unwarranted. (App. C at 39a-40a)

Also during the administrative hearing, Petitioners' counsel elicited testimony from Dr. Kelly that Dr. Clark was not qualified to evaluate Shelby as she suffered from a completely different disease than that with which he was familiar. Clark had only

treated two (2) or three (3) patients with Familial Dysautonomia and none with Autonomic Nervous System Dysfunction, the type of Dysautonomia with which Shelby has been diagnosed with. Dr. Kelly also testified that she submitted numerous medical evaluations to Respondent and had spoken with school personnel about Shelby's condition prior to Respondent requesting its own evaluation and that Shelby's examination by a new physician could be harmful to Shelby and could trigger a life-threatening crisis. Importantly, counsel for Respondent asked absolutely no questions on cross-examination of Dr. Kelly related to her comments about Dr. Clark's lack of qualifications to examine Shelby and about the danger to Shelby if evaluated by Dr. Clark. (App. C at 40a)

The truth of the matter is, as reflected in the record, the decision of the hearing officer to grant the school's request was actually a forgone conclusion and he clearly believed he had absolutely no discretion to do otherwise. While he permitted evidence and discussion on the issue, the Hearing Officer seemed not at all inclined to actually consider Shelby's and Ms. T.'s position that the requested medical evaluation was not educationally warranted and in fact, would actually be harmful to Shelby. At the close of the Hearing, the Hearing Officer stated:

> "So the law is very clear. Andress versus Cleveland is very clear. The Fifth Circuit left no ambiguity. The sentence is almost exactly this: There is no exception to the right of the school district to get an independent evaluation. I said that at the first prehearing conference on this case . . . All this other stuff is the sideshow as far as I am concerned."

The Hearing Officer issued his decision on July 9, 2003, merely two days after post-hearing briefs were submitted. (App. C at 31a, 34a) The Hearing Officer held that the Respondent provided Petitioners with appropriate notice of its need for a medical evaluation. The Hearing Officer also completely dismissed Petitioners' argument that *Andress* only

applied in cases of an initial evaluation to determine eligibility or for a triennial evaluation. The Hearing Officer held that there was no exception to the rule that a school district has a right to test a student's eligibility under IDEA. (App. C at 50a)

The Hearing Officer acknowledged that Mrs. Phelps' (the Principal) decision to bar Ms. T. from Shelby's class was an exercise of dubious judgment. The Hearing Officer also acknowledged that had Ms. T. done as Mrs. Phelps had asked, namely bring Shelby to school but not come herself, Shelby's well-being could have been jeopardized. Nonetheless, the Hearing Officer found these facts irrelevant to Respondent's request for a medical evaluation and therefore irrelevant to the entire case. He did not consider whether those facts contributed to a denial of FAPE, as the Petitioner argued. (App. C at 47a)

THE DISTRICT COURT DECISION

Petitioners appealed the Hearing Officer's decision to the United States District Court for the Southern District of Texas, Houston Division.[6] Petitioners again argued that *Andress* was limited to the mandatory initial evaluation of a student's eligibility for a student's eligibility for special education and related services and to the three year reevaluation, but not for discretionary evaluations or ones where eligibility had been determined. Petitioner further argued that *Andress* was no longer controlling law because of the 1997 changes to the IDEA which gave parents greater rights. Specifically, pre-1997 IDEA only required parental consent for the initial evaluation while the 1997 changes to the IDEA added the requirement of parental consent for the three year evaluation. In fact the legislative committee noted that "a child should not be subjected to

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6. *See*, 20 U.S.C. § 1415(i)(2)(A) ("Any party aggrieved by the findings and decision . . . [of a Hearing Officer], shall have the right to bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy").

unnecessary tests and assessments." COMM ON LABOR AND HUMAN RES., 105TH CONG., REPORT [TO ACCOMPANY S. 717] at p. 19 (1997), *reprinted in* NICHCY NEWS DIGEST 26 at 5. Petitioners argued that *Andress* did not allow the Hearing Officer any discretion to deny a school district the ability to perform an unnecessary medical evaluation, and as such, *Andress* did not make sense in light of the 1997 changes to IDEA which intended to give parents more input into their children's education and to limit intrusive and unnecessary procedures. (App. B at 21a-25a)

Petitioners also added new, non-IDEA based claims for violation of the ADA, the Rehabilitative Act, the Fourteenth Amendment to the United States Constitution, and the Texas Human Resource Code. Specifically, Petitioners alleged that Respondent discriminated and retaliated against them, failed to provide Ms. T. with adequate due process, interfered with their constitutional rights to familial privacy and integrity and denied Shelby reasonable accommodations and access to school. (App. B at 29a-31a)

Respondent filed a *Motion to Dismiss or, Alternatively for Summary Judgment*, arguing that the Hearing Officer correctly relied on the Fifth Circuit's holding in *Andress* in finding that the school district had the right to perform its own medical evaluation. Respondent also argued that all of the claims added to the District Court Complaint should be dismissed because the Petitioners had not exhausted administrative remedies and as such the District Court did not have subject matter jurisdiction over those claims. (App. B at 19a)

With regard to Petitioners' non-IDEA based claims, the Court agreed with Respondent that Petitioners were required to, and had not, exhausted their administrative remedies, and as such dismissed those claims. The Court also disagreed with Petitioners' argument that *Andress* was limited to situations where a school was seeking to conduct an initial evaluation or a three-year reevaluation, and as such dismissed Petitioner's appeal as to the question of whether the Respondent had to right

to require a medical evaluation. Further, the District Court determined there was no infirmity in regard to the issue of informed consent as, and among other things, it did not result in the loss of an educational opportunity for Shelby or seriously infringe on Ms. T.'s opportunity to participate in the IEP process, or clearly result in the loss of FAPE. (App. B at 28a-30a)

In addition, the Court held that because it was upholding the Hearing Officer's decision, Petitioners' procedural due process and Fourteenth Amendment claims were precluded and Petitioners had not demonstrated a genuine issue of material fact that their constitutionally protected rights as to familial privacy and integrity had been violated. (App. B at 29a-30a)

THE FIFTH CIRCUIT COURT OF APPEALS DECISION

Petitioners appealed the District's Courts grant of summary judgment to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals stated that the sole issue was "under what circumstances may a school district compel a medical examination of a student, necessary for IDEA-mandated reevaluation purposes, when the student's guardian refuses consent." (App. A at 7a)

Petitioners again argued that *Andress* was either inapplicable to their case, or in addition and in the alternative, it should be overturned in light of the 1997 Amendments to IDEA. In addition, Petitioners argued that they had created a genuine issue of material fact with regard to the Respondent's need for a medical evaluation, and as such, the District Court's grant of summary judgment was improper. Respondent reiterated its position that there is no exception to the rule that a school district is entitled to conduct its own evaluation.

The Court of Appeals affirmed the District Court's ruling and underlying administrative decision. However, the Court of

Appeal's decision seems to raise more questions than it answered when it stated:

> "We agree and conclude that where a school district articulates reasonable grounds for its necessity to conduct a medical reevaluation of a student, a lack of parental consent will not bar it from doing so."

Finally, the Court of Appeals held that allowing the evaluation did not violate Shelby's right to privacy because Shelby was "free to decline special education under IDEA rather than submit to [Respondent's] medical evaluation."[7] (App. A at 9a)

REASONS FOR GRANTING THE PETITION

This case implicates the right of parents to obtain a free appropriate public education for their children with disabilities. It is a right once denied by many local school districts, but now firmly grounded in federal law – the Individuals With Disabilities Education Act or IDEA. It is, however, a right that is meaningful only if parents and their children continue to maintain the valuable constitutional protections that have developed over the course of the last century. There is no reason Shelby's constitutional rights, and by extension those of her grandmother, and other persons similarly situated, need be barred at the schoolhouse gates, *see Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)[8], as "[t]he vigilant protection

7. This particular portion of the Court's opinion is troubling for several reasons, not the least of which is that given Shelby's condition, she quite frankly would not have survived attending school in a regular education setting without the school following physician's orders exactly, including a one-to-one health care provider.

8. In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." 393 U.S. at 511.

of constitutional freedoms is nowhere more vital than in the community of American schools," *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

When the Court of Appeals stated that the school district had to articulate reasonable grounds for the necessity of the requested evaluation, it seemed to agree with Petitioners' position that the school did not have an absolute right to compel a medical evaluation of Shelby. With this clarification of *Andress* the hearing officer clearly now has the discretion to determine whether or not the requested evaluation was reasonable. However, Petitioners would argue that the Fifth Circuit's analysis should not have ended there. Their decision actually provided a "jump-off point" for an issue given short shrift at earlier stages in this litigation; namely, what standard must a school meet in order to override parental refusal to perform a medical evaluation. Petitioners do not believe that a school should be permitted to over-ride a fundamental right by merely articulating a reasonable basis for such intrusion, as the Fifth Circuit has determined. Rather, Petitioner would argue that parents have a fundamental right to control the provision of medical care or evaluations of their child, and that the state may only over-ride a parent's refusal, if there is a sufficiently compelling reason to do so, and if so, only then in the least restrictive manner.

There are a number of reasons why this Petition should be granted. First, any issue that attempts to erode important constitutional rights of parents and disabled children is important to this Court. In fact, this fact alone makes this petition a worthy candidate for certiorari. Sup. Ct. Rule 10(a).

Second, the issue stated herein presents important public policy concerns, because it directly impacts the civil rights of those parents and children who depend upon the IDEA to obtain real educational opportunity, and there is a clear conflict between the standard of review articulated by the Fifth Circuit and the standard long held by the Supreme Court in matters of

fundamental parental rights. As recently noted by the Petitioners in their writ to this Court in the *Shaffer v. Weast* case, more than 3,000 administrative hearings are held under the IDEA each year. A review of the Special Education Connection[9] library noted that *Andress* has been cited over 280 times since it was decided. Of course, this statistic does not include those unreported cases where a school requested an unwanted or unwarranted medical evaluation and the parents relented, or cases that were filed but ultimately withdrawn when parents assessed the difficulty of the process and the almost impossible burden to overcome.

Last, this petition presents an ideal vehicle for resolving the issue. The issue is mature. The case is not cluttered by collateral issues. The decision by the Court of Appeals below neatly frames the issue for resolution by this Court. This issue is of constitutional proportion and integral to the ability of certain children, like Shelby, to attend public school safely. As such, this petition should be granted.

I. THE DECISION BELOW CONFLICTS WITH WELL-SETTLED CONSTITUTIONAL LAW

The decision of the Hearing Officer, affirmed by the District Court and most recently affirmed by the Court of Appeals, that a school district has an absolute right to have their own physician complete a medical evaluation of a child, even if the parent refuses to consent to such evaluation, as long as the school district articulates reasonable grounds, directly conflicts with well-settled constitutional law regarding fundamental rights.

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9. Specialedconnection, whose internet address is *http://www.specialedconnection.com/LrpSecStoryTool/splash.jsp* is a special data base, administered by LRP (Labor Relations Press), that solely provides citation to any and all cases that deal with special education or disability related issues.

A. INDIVIDUALS HAVE A FUNDAMENTAL RIGHT TO REFUSE TO CONSENT TO UNWANTED MEDICAL INTERVENTIONS

At common law, even the touching of one person by another without consent and without legal justification was a battery. *See* W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 9, pp. 39-42 (5th ed. 1984). Before the turn of the century, the Supreme Court observed that "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. Justice Cardozo, while on the Court of Appeals of New York, aptly described this doctrine as "[e]very human being . . . has a right to determine what shall be done with his own body," *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914). The informed consent doctrine has become firmly entrenched in the American legal terrain. *See* Keeton, Dobbs, Keeton, & Owen, supra, § 32, pp. 189-192; F. Rozovsky, Consent to Treatment, A Practical Guide 1-98 (2d ed. 1990). The logical corollary of the doctrine of informed consent is that a person generally possesses the right not to consent, that is, to refuse treatment. Of course for a child who does not have the legal capacity to provide actual informed consent, this constitutional right to accept or reject an intrusive medical procedure extends to their parents.

It is uncontroverted that Ms. T., Shelby's grandmother (and other parents similarly situated) have the right, and concomitant duty, to provide, or as necessary, withhold medical treatment for Shelby subject only to a compelling state interest.

B. PARENTS HAVE A FUNDAMENTAL RIGHT TO CARE FOR THEIR CHILDREN

The interest at issue in the instant case — the interest of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court. More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923), this Court held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Just two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925), the Court again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control."

In subsequent cases also, there is recognition of the fundamental right of parents to make decisions concerning the care, custody, and control of their children. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing "the fundamental liberty interest of natural parents in the care, custody, and management of their child").

In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children, including and especially those related to medical decisions. *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (parents have a right, coupled with the high duty, to recognize symptoms of illness in their children and to seek and follow medical advice).

In a related vein, and by extension, the fact that parents have the right to refuse unwanted medical treatment for their child, is also a right deeply rooted in our country's history, tradition, and practice as to require special protection under the Fourteenth Amendment. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278-279 (1990); *see also, Washington v. Glucksberg*, 521 U.S. 702, 725 (1997)

Ms. T. and other parents similarly situated fall under the constitutional protection noted in this section. While it is clear that a parent has this fundamental interest, it is also not disputed that this interest may be contravened or trumped by a compelling state interest. *Parham v. J.R.* ("a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized). At issue in this cause, is whether or nor a school's request for an intrusive medical procedure to a medically fragile child, that could be harmful to that child, could ever satisfy such a stringent standard.

C. THIS RIGHT MAY ONLY BE OVERCOME BY A COMPELLING STATE INTEREST

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." This Court has long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." 521 U.S. at 720; *see also Reno v. Flores*, 507 U.S. 292, 301-302 (1993). In short, if the state wants to intrude upon a constitutionally protected fundamental right, like it has in this case, it must evidence a compelling state interest to do so. Other state educational agencies have recognized this very concern.

For instance, in *Dallas School District*, 27 IDELR 663, p. 5 (Oregon SEA Jan. 6, 1998) the hearing officer expressly rejected *Andress'* implicit endorsement of the proposition that "[w]e had to knowingly reduce the child to a vegetative catatonic state with our attempted evaluations in order to provide her with a free appropriate public education." Petitioners admit there may be some occasions where a state's interest could rise to the level that it would meet this "compelling state interest," standard (*Veronia School District 47j v. Axton*, 515 U.S. 646 (1995) (school board's policy requiring drug testing for all athletes is constitutional under 4th and Fourteenth Amendments); *Board of Education v. Earls*, 536 U.S. 822 (2002) (school board's policy requiring drug testing for all students participating in extra-curricula activities is constitutional pursuant to Fourth Amendment).

However, Petitioners are hard-pressed to see how it would pass muster in the instant cause, or in any other case where there is significant medical testimony that the requested medical evaluation would be harmful to the child.

Nevertheless, and assuming that the state has a compelling interest in having children who are receiving special education services be evaluated by their own physician or medical staff on occasion, the effort to gather the information necessary must be garnered in the least intrusive manner and means, and narrowly tailored to the objective of the state. *See, City of Cleburne, Texas et al., v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

D. THE STATE'S INTEREST MUST BE ACHIEVED IN THE LEAST RESTRICTIVE MANNER

The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174-175 (1980); *Vance*

v. Bradley, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). When social or economic legislation is at issue, like IDEA in the instant case, the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

The general rule gives way, however, when a statute classifies by race, alienage, or national origin, or infringes upon a fundamental right. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy — a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Graham v. Richardson*, 403 U.S. 365 (1971). Similar oversight by the courts is due when state laws impinge on personal and fundamental rights protected by the Constitution, *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), such as those at issue in this case.

One can easily surmise that the state has a rational basis to evaluate children who require special education services. But the state has only shown the ability to meet a compelling standard, in the school context, in a very limited number and types of cases, as noted above.

In the context of IDEA, one would have to look far and wide to find an instance where the state's interest in having a child undergo an intrusive medical procedure, that could cause injury to the child when undergoing the evaluation, would satisfy this "compelling state interest standard." This is especially so in light of the fact, and as noted in the instant cause, that there

already exists the information hoped to be gathered, and it is readily available.

Even if this court determines that the state does meet this "compelling interest standard" both in Shelby's case, and for other children in a similar posture, the state's interest must be achieved in the least restrictive manner. A review of the facts in Shelby's case, and the manner in which Conroe ISD attempted to procure the information they deemed necessary, would be a good example of the kinds of methods that do not satisfy the "least restrictive manner" standard.

Petitioners respectfully request that this Court accepts this writ, so as to send a message to school districts across the land that in order to over-ride a parental denial of consent school districts must exhaust all reasonable less restrictive alternatives before the school's rights could ever trump those of the parent.

II. DETERMINING THE LEVEL OF REVIEW AND PROOF A SCHOOL MUST MEET TO OVERRIDE PARENTAL CONSENT IS AN IMPORTANT ISSUE THIS COURT SHOULD DECIDE[10]

IDEA is the principal vehicle by which educational benefits are provided to children with disabilities. It is, therefore, especially inappropriate for the law to give school districts to have the absolute right to over-ride a parent's fundamental rights and force a child to undergo a potentially life threatening medical evaluation. Simply put, children with disabilities and parents in some States have fewer or less effectual rights than their counterparts in other States, even though all were intended to be beneficiaries of the same national law. This Court should resolve the conflict.

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10. Petitioners give special thanks and credit to those counsel who wrote the *Writ* in the *Weast* case, William H. Hurd, Siran S. Faulders, Michael J. Eig, and Haylie M. Iseman. Much of the rationale provided in their *Writ* and in a similar section is herein, is almost verbatim.

The need for certiorari is underscored by the large number — and broad range — of disabled students served by the IDEA. The U.S. General Accounting Office ("GAO") recently noted that, nationwide, about 6.5 million children and young adults – aged 3 through 21 – receive special education services under the IDEA. These 6.5 million students are "about 13 percent" of the total number of students nationwide, and they include "a wide variety of needs that range from mild to severe." Children with speech or language impairments, specific learning disabilities, emotional disturbance, hearing impairments (including deafness), visual impairments (including blindness), orthopedic impairments, autism, traumatic brain injury, other health impairments, or mental retardation, and who need special education and related services under IDEA.

The GAO also reported that, "[w]hile national data on disputes are limited and inexact," more than 3,000 due process hearings are held each year. It is, however, not just those who actually participate in hearings who are affected by the concerns addressed herein. Many more hearings are requested than are actually held. The same GAO Report noted that 11,068 hearings were requested in 2000, but only 3,020 were held. Such a discrepancy suggests that many parents find the process too daunting and simply capitulate. The difficulties parents encounter will be either exacerbated or ameliorated by the recent Fifth Circuit decision that a school must only meet a "reasonable" standard in order to overcome a parent who refuses to provide consent.

Indeed, knowing what level of proof the school requires to show it has a compelling interest can affect the outcome much earlier in the process. When parents and the school district sit down to negotiate the education program for a child, and a medical evaluation is a concern, an awareness of what the standard of review is and the level of proof the school must provide in order to over-ride a denial of parental consent, can significantly affect the negotiation dynamics. Establishing that

the school's stated purpose must be compelling, and that the means to be used to achieve that goal are the least restrictive, is in lock-step with other constitutional law protecting the fundamental nature of the parent-child relationship.

There is a manifest need for a uniform national rule on this issue. The extreme standard adopted by the Fifth Circuit, that the school has an absolute right, subject only to the articulation of reasonable grounds, to seek an evaluation of a child, even if a parent refuses to consent, makes it especially appropriate that such a bright line rule be established here. As a result of the decision below school districts will have the ability to easily overcome a fundamental parental right, that very few, if any, public entities now have. Further, when faced with a dilemma as to whether to permit the evaluation or not, parents will have to decide whether to take their children out of public school or waive away their constitutional rights. A uniform rule and standard is needed. Certiorari should be granted.

III. THIS PETITION PRESENTS AN IDEAL VEHICLE FOR DECIDING HOW TO ALLOCATE THE BURDEN OF PROOF

Not only is the standard of review and level of judicial scrutiny required so as to permit a school district to over-ride a denial of parental consent when requesting a medical evaluation of a child, where the medical evaluation could be harmful to the child, an issue that should be resolved in a timely manner, this petition presents an ideal vehicle for resolving it. This is so for several reasons.

The case is not cluttered by collateral issues that could distract from the question presented or hinder its resolution. The standard of review and level of proof, and in a related vein, the level of judicial scrutiny required, are the only issues implicated by the decision below.

By making the standard of review and level proof on the school in these instances merely the articulation of reasonable grounds, the decision below stands in stark contrast with well-settled and longstanding constitutional law that suggests otherwise. These "jurisprudential bookends" underscore the issue with particularity for resolution by this Court.

Finally, the recent decision in *Schaffer v. Weast,* 126 S. Ct. 528, 2005 LEXIS 8554 (November 14, 2005), highlighted and underscored the importance of special education services in the public policy and legal terrain, and of course, and in the eyes of this Honorable Court. While *Weast* settled the issue as to which party has a burden of proof in an "impartial due process hearing," 20 U.S.C. §1400(f), it left open the issue as to what standard of review and level of proof is required, and the level of judicial scrutiny necessitated, when a school and a parent clash on the battleground of a disabled child's life. Petitioners believe this issue is equal to the one recently determined in *Weast* and should likewise be heard by this Honorable Court.

SUMMARY OF ARGUMENT

It is of great importance to all disabled children, especially those who are medically fragile, that the Court assure that their access to a "free appropriate public education," and that the constitutional rights in support thereof, are not be compromised or abrogated by the schools.

There was never any Congressional intent to abrogate parental rights when IDEA was developed. To the contrary, Congressional intent was to form an alliance between the parents and the school to promote and protect the best interests of all disabled children. However, *Andress* has violated Congressional intent and abrogated fundamental parental rights, and basically stood IDEA on its head. In its assignment of an absolute right to the school districts, it conversely denied parents all rights. Further, the Fifth Circuit's statement that children who are not submitted for evaluation are not eligible for IDEA abrogates

Congress' desire to provide a free and appropriate education to all disabled children. 20 U.S.C. § 1400(d)(1)(C).

When the Fifth Circuit stated that constitutional issues are not involved in this case, they left all the Shelbys of the special education world with a "Hobson's choice," i.e., declining special education services, or submitting to an unnecessary and unwarranted intrusive medical evaluation.

The Supreme Court has long held that all persons have the right to be secure in their own bodies, and it is only reasonable to believe that no child should be placed at risk of life simply in order that a school district might have the "right" to supplant a child's own doctor's orders with new orders from an outside physician, with no experience in the child's care.

The Supreme Court has also held that parental rights are fundamental and that to overturn parental rights, the state must show a compelling interest, and prove that the state's alternative is the least restrictive means of achieving the goal. Under IDEA, the goal must also be clearly defined. Educational evaluations and medical evaluations differ substantially. Even with educational evaluations, it seems obvious that Congress intended parents to exercise parental control, with the multiple references to how the IEP team was to incorporate parental input. 20 U.S.C. § 1414.

With the extremely limited references to medical examination, it seems obvious that Congress did not intend IEP teams to attempt to control the medical regimes of children in school, or to attempt to usurp the parental prerogatives, must less those of the physicians who wrote prescriptive orders for a child's care at school. It does not seem "reasonable" for a group of educators to "disagree" with a physician's orders for a child's healthcare, or to place themselves in authority above a physician and attempt to override orders for a child with a life threatening health condition, nor is there any provision in IDEA for such a procedure. It seems clear that Congress would not have devised

a plan that required parents to put life threatening medical decisions in the hands of school staff. IDEA certainly makes no provisions for this and this Court should assure no one else does.

The establishment of a compelling interest bright line in these types of cases, by the Supreme Court will afford justice to many other disabled children and to their parents, and return education law to a standard more in line with fundamental American values, as well as act to eliminate disparity in the various administrative hearings, district courts, and circuits. Justice will be served by the intervention of the Supreme Court in this issue.

For any and all the above noted reasons, Petitioners respectfully request their *Petition for a Writ of Certiorari* be granted.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

CAREN MORGAN CAMBRE
1300 Jefferson Street
Gretna, LA 70053
(504) 251-4359

MARTIN J. CIRKIEL
Counsel of Record
CIRKIEL & ASSOCIATES, P.C.
1901 East Palm Valley Boulevard
Round Rock, TX 78664
(512) 244-6658

Attorneys for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JUNE 26, 2006

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-20666

SHELBY S, by next friend KATHLEEN T,

Plaintiff-Appellant,

v.

CONROE INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee.

JUDGES: Before JONES, Chief Judge, and WIENER and PRADO, Circuit Judges.

OPINION: Edward C. Prado, Circuit Judge:

Plaintiff-Appellant Shelby S. ("Shelby") appeals the district court's grant of summary judgment in favor of Defendant-Appellee Conroe Independent School District ("CISD"). Shelby contends that the district court erred in affirming the decision of the Special Education Hearing Officer ("Hearing Officer"). The Hearing Officer concluded that there is a need for CISD to perform a medical evaluation on Shelby in order to develop and implement a special education program for her pursuant to the Individuals with

Disabilities Education Act ("IDEA"). The Hearing Officer ordered that CISD be permitted to conduct a medical evaluation of Shelby, despite objections from Shelby's guardian. For the reasons that follow, we AFFIRM.

Background:

Shelby is a student in the CISD and is eligible to receive special education under the IDEA. She suffers from a rare autonomic nervous system[1] disorder known as Dysautonomia that makes her medically-fragile: she is prone to sudden "crises" that can result in unconsciousness, cyanosis, cardiac arrest, and death. Kathleen T. ("Ms. T") is Shelby's grandmother, guardian, and primary caregiver; she is most familiar with Shelby's physical cues that precede her crises and is the person most experienced in responding to such crises. Shelby's treating physician is Dr. Dorothy Kelly. Dr. Kelly is a pediatric pulmonologist and specialist in Shelby's disorder.

Shelby's autonomic nervous system dysfunction makes her susceptible to periods where she has decreased cardiac output. Shelby also has episodes where her larynx goes into spasms and she cannot get air into her lungs. If left untreated, Shelby can die from one of these episodes. In addition, Shelby is particularly sensitive to room temperature: if she is in a room where the temperature exceeds 72 degrees, she may experience life threatening symptoms. She can also experience an adverse reaction to emotional stressors or other stimuli.

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1. The autonomic nervous system regulates bodily functions and the activity of specific organs in humans.

Appendix A

Prior to the 2002-03 school year, Shelby was home-schooled and made only brief visits to school to socialize with the other children. At the beginning of the 2002-03 school year, Dr. Kelly reported that Shelby could attend school under certain conditions. On August 16, 2002, an Admission, Review, and Dismissal committee ("ARD committee") met and prepared an individualized education program ("IEP") report for Shelby.[2] Ms. T participated in the meeting and agreed with the recommendations. The ARD committee was given written information about Shelby's special health needs and requirements. The ARD committee agreed that Shelby would receive instruction in the mainstream education classroom, but with modifications for her needs. Additional support staff would be in Shelby's classroom and outside. Ms. T would be notified when Shelby

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2. As we explained in *Cypress-Fairbanks Independent School District v. Michael F.*:

> The "free appropriate public education" that a disabled student is entitled to receive under the IDEA must be tailored to [her] particular needs by means of an "individual educational program" ("IEP"), a written statement prepared at a meeting attended by a qualified representative of the school district, a teacher, the child's parents or guardians, and, when appropriate, the child himself. In Texas, the persons charged with preparing an IEP are known collectively as an Admissions, Review and Dismissal Committee ("ARD Committee").

118 F.3d 245, 247 (5th Cir. 1997); see 20 U.S.C. § 1401(11) (2000) (amended 2004); *§ 1404(d).*

had been administered Belladonna.[3] Special transportation would be initiated for Shelby on September 3, 2002; Ms. T would bring her to school until that date. There was no agreement that Ms. T, or any other aide, would attend classes with Shelby on a daily basis.

Shelby attended school that year for five days during the first two weeks of the 2002-03 class year. Ms. T accompanied Shelby to the classroom each day. Ms. T would sit at the back of the class, but would periodically go to Shelby's desk to talk to her and give her snacks. She also called to Shelby from the back of the room, reviewed the desks of other children, and commented to Shelby's teacher about other children. Ms. T sometimes left Shelby's class and her absences would last a few minutes to an hour.

On August 27, 2002, because Ms. T's presence was unacceptable to the administration at Shelby's school,[4] the principal of the school informed Ms. T she could no longer attend class with Shelby. As a result, Shelby did not return to class.

On August 28, 2002, Dr. Kelly sent a fax to Shelby's school, identifying Ms. T as Shelby's designated caregiver. Dr. Kelly gave instructions to the school that Ms. T was to train an appropriate classroom aide for Shelby and estimated

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3. Belladonna is a drug that may be administered to Shelby when she goes into cardiac arrest.

4. According to Shelby's teacher, Ms. T's presence was disruptive in class.

that it would take about two to four weeks to train an aide. Dr. Kelly suggested that Ms. T accompany Shelby in the classroom in order to attend to her healthcare needs until an aide could be trained. The ARD committee met on September 6, 2002, recessed and met again on September 26, 2002, to discuss Shelby's IEP and Dr. Kelly's fax. The purpose of the meetings was to address modifications to Shelby's IEP that were not addressed at the August 16, 2002 ARD committee meeting. At the September 6 meeting, the ARD committee requested permission to speak with Dr. Kelly regarding the need for supportive services in the classroom, but Ms. T limited her consent. Ms. T told the ARD committee to put its questions in writing -- fourteen specific questions, subject to Ms. T's approval -- to be delivered to Dr. Kelly. Ms. T edited Dr. Kelly's responses to the questions before they were provided to the ARD committee. She specifically limited the access between Dr. Kelly and members of Shelby's ARD committee because she was concerned about Shelby's privacy. Ms. T did allow the school nurse and Shelby's second grade teacher to talk to Dr. Kelly regarding the [**7] fourteen questions, for the purpose of obtaining information for educational purposes but not for prognosis.

The ARD concluded it needed additional information about Shelby, in order to reevaluate her IEP. The ARD committee asked Ms. T for consent to seek its own evaluation of Shelby. The ARD committee wanted to arrange for an outside medical evaluation by a Dysautonomia specialist. Ms. T refused consent on September 6, 2002. She claimed that the outside medical specialist's anticipated examination of Shelby was likely to cause Shelby serious harm, and in any case, was unwarranted.

Appendix A

In September and November the school district and Ms. T remained in disagreement regarding whether Shelby's guardian needed to be present in the classroom, the proper accommodations for Shelby, and whether CISD would be able to conduct further evaluations. Shelby received instruction for the remainder of the school year as a homebound student.

Procedural History:

In February 2003, CISD requested that the Texas Education Agency hold a hearing, pursuant to the IDEA, so that it could proceed with its evaluation of Shelby in the absence of parental consent. CISD stated that Ms. T refused to send Shelby to school; Ms. T claimed Shelby's health status was fragile, and that Shelby risked serious injury or death if required to come to school without her guardian. CISD explained that it did not believe that Shelby's guardian needed to be present in the classroom. It stated it needed to perform a medical evaluation of Shelby to verify the nature and extent of her health problems. The Hearing Officer, Stephen P. Webb, conducted a hearing in June 2003. He determined that because there was conflicting or missing information about Shelby's eligibility for special accommodations and support services, CISD was justified in attempting to augment its information about Shelby in order to develop an IEP that would meet her needs.

Shelby filed a complaint in district court, challenging the Hearing Officer's decision under the IDEA. Shelby asked the district court to find that CISD was not entitled to a medical evaluation without parental consent. CISD filed a

motion to dismiss, and alternatively, for summary judgment. It argued that it is entitled to evaluate Shelby to determine the nature of her disability.

The district court determined that CISD was entitled to summary judgment and affirmed the Hearing Officer's decision that granted the school district the right to conduct an independent medical evaluation of Shelby. The district court entered final judgment on June 15, 2004. Shelby filed a motion for rehearing, which the district court denied. On August 5, 2004, Shelby timely filed her notice of appeal of the final judgment. On appeal, Shelby asks this court to review the district court's affirmance of the Hearing Officer's decision.

Standard of Review:

When we address a district court's review of a state hearing officer's decision in an impartial due process hearing under the IDEA, we treat mixed questions of fact and law *de novo* and review underlying fact-findings for clear error. *Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 347 (5th Cir. 2000).*

Discussion:

The issue before the court is: under what circumstances may a school district compel a medical examination of a student, necessary for IDEA-mandated reevaluation purposes, when the student's guardian refuses consent? The

Appendix A

IDEA sets out a comprehensive scheme to evaluate each student in order to meet the IDEA's education goals.[5] *See 20 U.S.C. § § 1400-1487.* After a designated period, or as need be, the IDEA requires reevaluations of each child educated under the act. *20 U.S.C. § 1414(a)(2)(2000)* (amended 2004).[6] However, prior to conducting any reevaluation, a local education agency must obtain informed parental consent. *20 U.S.C. § 1414(c)(3).* If the legal guardian of a child refuses consent, the local education agency may continue to pursue its evaluation through an impartial due process hearing.[7]

Under the circumstances at hand, CISD is entitled to perform a reevaluation of Shelby. The IDEA states that a reevaluation is warranted when the school district requires evaluation materials that are essential to assessing a child's special education needs. *See 20 U.S.C. § 1414(c)(1)-(2).*

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5. The purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." *20 U.S.C. § 1400(d)(1)(A) (2000)*(amended 2004). The applicable version of *section 1400* was effective from June 4, 1997 to June 30, 2005.

6. The applicable version of *section 1414* was effective from July 1, 1998 to June 30, 2005.

7. *20 U.S.C. § 1414(a)(1)(C)(ii)* ("If the parents of such child refuse consent for the evaluation, the agency may continue to pursue an evaluation by utilizing the mediation and due process procedures under *section 1415* of this title."); *§ 1414(c)(3)* (applying subsection *(a)(1)(C)* to reevaluations); *§ 1415(f)* (2000) (amended 2004) (providing for an impartial due process hearing).

In order for CISD to know how to formulate an IEP consistent with Shelby's extreme symptoms, Shelby's ARD committee needed access to her medical history and specialist, Dr. Kelly. However, Shelby's guardian, Ms. T, limited the medical information that was available to Shelby's ARD committee by scripting the main encounter between Dr. Kelly and the ARD committee with fourteen pre-approved questions. Ms. T then edited Dr. Kelly's answers to the ARD committee's questions. Without more complete medical information about Shelby, the ARD committee was not able to fashion an IEP that would allow CISD to perform its IDEA-mandated duty.

The Hearing Officer and the district court concluded that CISD was within its right to evaluate Shelby in order to obtain necessary evaluation materials. We agree and conclude that where a school district articulates reasonable grounds for its necessity to conduct a medical reevaluation of a student, a lack of parental consent will not bar it from doing so.

Shelby also argues that allowing a medical evaluation without consent violates her right to privacy, but CISD's reevaluation of Shelby is not constitutionally problematic. Shelby is free to decline special education under IDEA rather than submit to CISD's medical evaluation. *See generally, Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1315 (9th Cir. 1987)* ("If the parents want Gregory to receive special education under the [IDEA],[8] they are obliged to permit [reassessment] testing. If the parents wish to maintain

8. In 1987, the relevant provisions were entitled the Education for All Handicapped Children Act.

Gregory in his current private tutoring program, however, the District cannot require a reassessment.") (internal citations omitted).

AFFIRMED. We will treat CISD's Motion to Strike Appellant's Memorandum of Errors and for Sanctions as a motion to strike and GRANT the motion.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED JUNE 15, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-03-4184

SHELBY S. b/n/f KATHLEEN THOMAS,

Plaintiffs,

v.

CONROE INDEPENDENT SCHOOL DISTRICT,

Defendant.

MEMORANDUM AND ORDER

Pending is Defendant Conroe Independent School District's First Amended Motion to Dismiss or, Alternatively, for Summary Judgment (Document No. 10).[1] After carefully considering the motion, response, replies, and applicable law, the Court concludes that the motion should be granted.

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1. Also pending is Defendant Conroe Independent School District's Emergency Motion to Stay Administrative Proceedings (Document No. 23). This Memorandum and Order will render moot Defendant's request to stay those administrative proceedings pending the outcome of this suit, and therefore Defendant's motion is DENIED as MOOT.

Appendix B

I. *Background*

This is the second lawsuit filed by Plaintiffs Shelby S. ("Shelby") and Kathleen Thomas ("Ms. Thomas"), Shelby's paternal grandmother and managing conservator, against Defendant Conroe Independent School District (CISD). Shelby is a nine-year-old child who was diagnosed by her physician, Dr. Dorothy Kelly ("Dr. Kelly"), with autonomic nervous system dysfunction. Under the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. § 1415 *et seq.*, Shelby is eligible to receive special education and related services from CISD.

A. *The First Lawsuit*

In July, 2002, Dr. Kelly issued several orders regarding Shelby's case that Dr. Kelly indicated must be obeyed in order for Shelby safely to attend school during the 2002-2003 school year. When school began in August, 2002, Ms. Thomas attended Giesinger Elementary School (the "School") with Shelby as her caregiver. Ms. Thomas contends that the School failed on several occasions to follow Dr. Kelly's orders, and she complained to School Principal Doris Phelps ("Ms. Phelps") and the school board that Shelby's rights under the Americans with Disabilities Act were being violated.

Thereafter, Ms. Phelps informed Ms. Thomas that, beginning August 28, 2002, Ms. Thomas would not be allowed in Shelby's classroom as her caregiver. Ms. Thomas and her attorney made written and verbal complaints at the local level, but the parties were unable to resolve their

differences. It appears that Ms. Thomas then removed Shelby from attending school because Ms. Thomas was not allowed to return with her as her caregiver.

Ms. Thomas then filed Plaintiffs' first lawsuit ("First Lawsuit"), alleging that CISD and various individuals had violated the Americans with Disabilities Act (ADA), 42 U.S.C. § 1981, and the 5th and 14th Amendments to the U.S. Constitution. By Order entered May 27, 2003, United States District Judge John D. Rainey of this Court dismissed Ms. Thomas's lawsuit on grounds that she had failed to exhaust her administrative remedies under the IDEA. The Fifth Circuit affirmed Judge Rainey's dismissal of Ms. Thomas's case. See *Thomas v. Conroe Indep. Sch. Dist.*, 83 Fed. Appx. 663 (5th Cir. 2003).

B. *The Second Lawsuit*

When the dispute arose over the propriety of Ms. Thomas's presence in the classroom as Shelby's caregiver, CISD requested Ms. Thomas's permission to conduct its own diagnostic medical evaluation of Shelby in order to assess which lifesaving supportive services were necessary in the classroom to allow Shelby safely to attend school. Ms. Thomas refused the request and insisted that CISD rely on information supplied by Shelby's physician, Dr. Kelly.

CISD then requested, while the First Lawsuit was still pending, an impartial due process hearing under the IDEA, 20 U.S.C. § 1414 (a) (1) (C) (ii), to assert its right to conduct its own medical evaluation of Shelby in order to determine

what supportive services, if any, Shelby needed in order safely to attend school and to receive a "free appropriate public education" ("FAPE"). CISD's due process hearing request was assigned to TEA Hearing Officer Stephen Webb, who conducted an evidentiary hearing on June 5 and 6, 2003. Both CISD and Ms. Thomas participated and presented evidence with respect to CISD's right to conduct its own medical evaluation of Shelby. On July 9, 2003, Hearing Officer Webb ruled that CISD is entitled to evaluate Shelby, but Ms. Thomas still has not allowed CISD to do so.

Instead, Ms. Thomas filed this case ("Second Lawsuit") in October, 2003, while her appeal of the First Lawsuit was still pending in the Fifth Circuit.[2] Ms. Thomas sues here in her own behalf and as next friend of Shelby to appeal Hearing Officer Webb's decision, alleging that the decision of the hearing officer was incorrect and was an abuse of discretion. However, Plaintiffs also have pled a number of the same issues that they raised in the First Lawsuit, namely, that CISD discriminated against Shelby by denying her access to a FAPE and retaliated against them for Ms. Thomas's complaints against CISD, in violation of (1) the IDEA, (2) the ADA, 42 U.S.C. § 12102, (3) the Rehabilitation Act, 29 U.S.C. § 794, (4) the 14th Amendment of the U.S. Constitution, and (5) the Texas Human Resources Code, Tex. Hum. Res. Code § 121.004.

CISD moves to dismiss Plaintiffs' claims, or alternatively, for summary judgment. CISD maintains that

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2. Judge Rainey's dismissal of the First Lawsuit was affirmed by the Fifth Circuit on December 18, 2003.

the hearing officer correctly relied on the Fifth Circuit's holding in *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176 (5th Cir. 1995), *cert. denied*, 117 S. Ct. 58 (1996), which is dispositive on Ms. Thomas's appeal from the hearing officer's decision. CISD argues that Plaintiffs' other claims, such as those that were dismissed in the First Lawsuit, are still subject to the IDEA's exhaustion requirement and have not yet been exhausted, and that the Court therefore lacks subject matter jurisdiction over those claims. Finally, CISD contends that to the extent Plaintiffs' claims are not subject to the IDEA's exhaustion requirement, they are without merit and should be dismissed.

II. *Discussion*

A. *CISD's Motion to Dismiss for Lack of Subject Matter Jurisdiction*

CISD maintains that the Court lacks subject matter jurisdiction over Plaintiffs' claims that are "unrelated to Hearing Officer Webb's decision" because they have failed to exhaust their administrative remedies under the IDEA. In addition to bringing claims under the IDEA, Plaintiffs allege that CISD violated the ADA, the Rehabilitation Act, the 14th Amendment of the U.S. Constitution, and the Texas Human Resources Code. Specifically, Plaintiffs allege that CISD discriminated and retaliated against them, failed to provide Ms. Thomas with adequate due process, interfered with their constitutional rights to familial privacy and integrity, and denied Shelby reasonable accommodations and access to school. Plaintiffs seek a declaration, costs and attorneys' fees.

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Although IDEA plaintiffs can bring claims under other statutes, such as the ADA and the Rehabilitation Act, it is required by 20 U.S.C. § 1415(1) that plaintiffs first must exhaust the IDEA's administrative remedies if the relief being sought is also available under the IDEA. *Pace v. Bogalusa City Sch. Bd.*, 325 F.3d 609, 622 n.20 (5th Cir. 2003); *Thomas v. East Baton Rouge Parish Sch. Bd.*, 29 F. Supp. 2d 337, 338-39 (M.D. La. 1998). *Accord Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 52-53 (1st Cir. 2000); *Babicz v. School Bd. of Broward County*, 135 F.3d 1420, 1422 (11th Cir. 1998); *Charlie F. v. Board of Educ. of Skokie Sch. Dist.* 68, 98 F.3d 989, 992 (7th Cir. 1996); *Hope v. Cortines*, 69 F.3d 687, 688 (2d Cir. 1995).[3]

Plaintiffs may bypass exhaustion of administrative remedies, however, if the use of the administrative process

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3. Title 20 U.S.C. § 1415(1) provides:

> (1) Rule of construction. Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, *except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter*, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

Id. (emphasis added).

would be futile or inadequate. *Honig v. Doe*, 108 S. Ct. 592, 606 (1988). The plaintiff has the burden of proving that exhaustion would be futile or inadequate. *Id.* With respect to their statutory claims, Plaintiffs have not met their burden.[4] Indeed, in their response to CISD's motion, Plaintiffs concede that "some of the so called 'new claims' may best be heard by and through administrative exhaustion," Document No. 13, at 10, and, on July 30, 2003, Plaintiffs filed their due process hearing request raising many of the same issues presented in this case, including CISD's alleged (1) denial of access to "personalized instruction with sufficient support services" for Shelby; (2) failure to allow Ms. Thomas to remain in the classroom; and (3) failure to follow Dr. Kelly's orders regarding Shelby.[5] Plaintiffs' evident acknowledgment that their claims have not been exhausted is well-taken. Indeed, their claims for retaliation and discriminatory denial of necessary medical support for Shelby—brought under the

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4. In her response to CISD's motion, Plaintiffs argue that they should not be required to exhaust their claims because, in addition to declaratory relief, they are also seeking damages which are unavailable under the IDEA. The prayer in Plaintiffs' First Amended Complaint, however, contains no request for damages. Even assuming that Plaintiffs are seeking damages that are unavailable under the IDEA, this Court has already considered—and rejected—this argument. *See Thomas v. Conroe Indep. Sch. Dist.*, No. H-02-4248, Document No. 30 (S.D. Tex. May 27, 2003) (Rainey, J.), *aff'd*, 83 Fed. Appx. 663 (5th Cir. 2003).

5. On January 5, 2004, TEA Hearing Officer Deborah McElvaney dismissed without prejudice Plaintiffs' due process hearing request pending the outcome of Plaintiff's appeal of Hearing Officer Webb's decision presently before this Court. *See* Document No. 10 ex. D, at 6.

ADA, the Rehabilitation Act, and the Texas Human Resources Code—seek the same relief that is available under the IDEA, and are therefore subject to the IDEA's exhaustion requirement. *See Pace*, 325 F.3d at 622 n.20 (finding that ADA claim for lack of handicap accessible facilities was a claim that could have been brought under the IDEA, so the plaintiff needed to exhaust administrative remedies before filing the ADA claim in federal court); *Weber*, 212 F.3d at 52-53 (concluding that the plaintiff had to invoke the due process hearing procedures of IDEA before filing her retaliation claim in federal court pursuant to Section 504 of the Rehabilitation Act); *Babicz*, 135 F.3d at 1422 (concluding that claims asserted under Section 504 and/or the ADA are subject to Section 1415(f)'s requirement that litigants exhaust the IDEA's administrative procedures to obtain relief that is available under the IDEA before bringing suit under Section 504 and/or the ADA). Likewise, such claims when brought under the IDEA must proceed first through the administrative process. Because Plaintiffs have not shown that these statutory claims have been administratively exhausted, i.e., that they were not formally presented to and adjudicated by Hearing Officer Webb or in any other administrative proceeding, the Court lacks subject matter jurisdiction over them.[6]

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6. Plaintiffs' constitutional claims are not required by the IDEA to be administratively exhausted, and are discussed below at pp. 20-22.

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B. *CISD's Motion to Dismiss for Failure to State a Claim or, Alternatively, for Summary Judgment*

CISD framed its motion as one to dismiss under Fed. R. Civ. P. R. 12(b)(6) or for summary judgment. Inasmuch as Plaintiffs and CISD have both submitted material outside the pleadings for the Court to consider on CISD's motion, it is appropriate to consider the alternative motion for summary judgment rather than the Rule 12(b)(6) motion. *See Young v. Biggers*, 938 F.2d 565, 568 (5th Cir. 1991).

1. *Standard of Review*

The IDEA standard for a federal district court's review of the hearing officer's decision is "virtually de novo." *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 808 (5th Cir. 2003). The IDEA dictates that the district court "shall receive the records of the administrative proceedings; shall hear additional evidence at the request of a party; and basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(B). The Supreme Court in *Board of Educ. of the Hendrick Hudson C. Sch. Dist. Bd. of Educ. v. Rowley*, 102 S. Ct. 3034 (1982), advised reviewing courts:

> [T]he provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation for the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. . . . The fact that [§ 1415(i) (2) (B)] requires that the reviewing court "receive the

> records of the [state] administrative proceedings" carries with it the implied requirement that *due weight shall be given to these proceedings.*

Id. at 3051 (emphasis added). Hence, "[t]he hearing officer's findings should be accorded 'due weight,' but the district court must arrive at an independent conclusion based on a preponderance of the evidence." *Adam J.*, 328 F.3d at 808 (citing *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993)). The party challenging the outcome of the state administrative decision bears the burden of proof. *See Board of Educ. of Community Consol. Sch. Dist. No. 21 v. Illinois State Bd. of Educ.*, 938 F.2d 712, 716 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 957 (1992).

The conventional summary judgment standard of review applies to Plaintiffs' constitutional claims, discussed below at pp. 20-22, which are not subject to the IDEA's exhaustion requirement. Rule 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party must "demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986).

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2. *Review of the Hearing Officer's Decision Regarding CISD's Right to Evaluate Shelby*

CISD maintains that Hearing Officer Webb correctly found that the Fifth Circuit's decision in *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176 (5th Cir. 1995), controls the issue of whether CISD has a right to conduct its own medical evaluation of Shelby. The plaintiffs in *Andress* sought to overturn a hearing officer's decision that a school district cannot be compelled to accept independent assessments in lieu of completing its own reevaluation. The district court overturned the hearing officer's decision and found in favor of the plaintiffs, holding that, while school districts have the right to use their personnel to reevaluate students, there is an exception where "supervening medical and psychological factors suggest that further evaluations . . . would further damage the student." *Andress*, 64 F.3d at 178.

The Fifth Circuit reversed the district court, holding that "there is *no exception* to the rule that a school district has a right to test a student itself in order to evaluate or reevaluate the student's eligibility under the IDEA." *Id.* at 179 (emphasis added). The court explained:

> If a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation. A parent who disagrees with the school's evaluation has the right to have the child evaluated by an independent evaluator, possibly at public expense, and the evaluation must be

> considered by the school district. It would be incongruous under the statute to recognize that the parents have a reciprocal right to an independent evaluation, but the school does not.

Id. at 178 (internal citations omitted). Plaintiffs respond that *Andress* is limited to the mandatory initial evaluation of a student's eligibility for special education and related services and to the three (3)-year reevaluation, and further that *Andress* is no longer controlling law because of changes made in the IDEA's governing regulations.

First, contrary to Plaintiffs' contention that discretionary evaluations are not permitted under the IDEA, nothing in the IDEA purports to prevent CISD from evaluating or reevaluating Shelby to assess her needs with respect to special education related services. The purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education *and related services designed to meet their unique needs* and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A) (emphasis added). In order to develop a child's "individualized education program" (IEP), the IEP team, which includes representatives from the local educational agency, must articulate "measurable annual goals, including benchmarks or short-term objectives, related to . . . meeting the child's *needs* that result from the child's disability to enable the child to be involved in and progress in the general curriculum." *Id.* § 1414(d)(1)(A)(ii)(I) (emphasis added). The IDEA mandates that a local educational agency, such as CISD, "shall administer such tests and other evaluation materials

as may be needed to produce the data" necessary to determine "the educational *needs of* the child." *Id.* § 1414(c) (2); *id.* § 1414(a)(1)(B)(ii) (emphasis added). Hence, a medical evaluation for the purpose of ascertaining Shelby's "special education and related services" needs, particularly her need for a trained aide, is well within the purview of the statute's evaluation and reevaluation requirements. *See* 34 C.F.R. § 300.500(b) (2) (defining "evaluation" as "procedures used . . . to determine whether a child has a disability *and the nature and extent of the special education and related services that the child needs*") (emphasis added).

Moreover, nothing in *Andress* limits its holding only to situations where a school is seeking to conduct an initial evaluation or a three-year reevaluation in order to assess a child's eligibility for special education. Indeed, several courts have applied *Andress* in cases where, as here, the issue was a parent's refusal to cooperate with the school district's request to conduct an evaluation to determine the level of service needed to address the child's disability. *See, e.g., Patricia P. v. Board of Educ. of Oak Park*, 203 F.3d 462, 468 (7th Cir. 2000); *Schwartz v. Learning Ctr. Acad.*, No. 4:00-CV-42, 2001 WL 311247, at *5 (W.D. Mich. Jan. 17, 2001). Thus, as Hearing Officer Webb properly found, *Andress* provides the governing rule that there is "no exception" to CISD's right to evaluate Shelby. In so finding, Hearing Officer Webb correctly noted:

> Shelby's privacy is important, as is [Ms. Thomas's] right to make decisions about Shelby's medical treatment. However, [CISD] is

> obligated to provide a free and appropriate public education to Shelby based on *complete* information.

Document No. 10 ex. A, at 10.

Contrary to Plaintiffs' further argument, the 1999 modifications to the IDEA's regulations concerning notice and consent, to wit, 34 C.F.R. §§ 300.500, 300.503, and 300.505, do not affect the holding in *Andress*. *Andress* focused on the regulation that grants a parent the right to an independent evaluation at public expense if the parent disagrees with the school's evaluation. *See* 64 F.3d at 178 ("A parent who disagrees with the school's evaluation has the right to have the child evaluated by an independent evaluator, possibly at public expense, and the evaluation must be considered by the school district.") (citing Independent Educational Evaluation, 34 C.F.R. § 300.503(a)(1) (1995) (now codified at 34 C.F.R. § 300.502(a)(1) (2003)). Construing this regulation, the court found that it would be "incongruous under the statute to recognize that the parents have a reciprocal right to an independent evaluation, but the school does not," and therefore held that there was "no exception" to the rule that a school district has the right to conduct its own evaluation. *Id.* at 178-79. In order to protect this right, school districts may utilize the due process procedures provided under the IDEA and its governing regulations to override a parent's refusal to consent to an evaluation that the school district proposes to obtain. *See* Parental Consent, § 34 C.F.R. § 300.505(b) (2003). Although 34 C.F.R. § 300.505(a)(1)(1) (2003) (formerly codified at Prior Notice; Parent Consent, 34 C.F.R.

§ 300.504(b) (1) (1998)) was amended in 1999 to require that parental consent be obtained not only for initial evaluations but also for reevaluations, 34 C.F.R. § 300.505(b) (formerly codified at 34 C.F.R. § 300.504(b)(3) (1998)) remains substantively unchanged in authorizing a school district to pursue an evaluation by using the due process procedures when the parents refuse to give consent. Moreover, the amendment to the regulations did not change the language of former 34 C.F.R. § 503(a)(1) (now codified at 34 C.F.R. § 502(a)(1)), which is the language construed in *Andress*. None of the amendments to the regulations change the controlling precedent of *Andress*.[7]

Accordingly, CISD is entitled to summary judgment affirming Hearing Officer Webb's decision granting CISD the right to conduct an independent medical evaluation of Shelby.

3. *Review of Hearing Officer Webb's Decision Regarding Notice*

Plaintiffs argue further that Hearing Officer Webb's finding that CISD provided adequate notice to Ms. Thomas is in error. The IDEA's implementing regulations require

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7. Also, the amendments to the regulations did not substantively change former Reevaluation, 34 C.F.R. § 300.534 (1995) (now codified at 34 C.F.R. § 300.536 (2003)), which was also examined in *Andress*. The only material change in the regulations was to require parental consent for the reevaluation required at least every three years but, again, this in no way removed the school district's right to pursue a reevaluation using the due process procedures when parents object to a reevaluation.

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CISD to send written notice to a child's guardian before identifying, evaluating, or placing the child under the IDEA. *See* 34 C.F.R. § 300.504. The notice must explain CISD's action with regard to the child, the reasons for the action, and the tests or reports that CISD considered. *See id.* § 300.503. CISD's "Notice of Evaluation" (the "Notice") acknowledged that the Admission, Review and Dismissal ("ARD") Committee required further data. The Notice then set forth the options considered/tried and the reasons those options were rejected. Lastly, it included a description of what the physical evaluation would entail, specifically noting that CISD sought an "outside medical evaluation [of Shelby] by autonomic specialist @ smoke-free facility." Document No. 13 ex. A-1. After having reviewed the Notice, Hearing Officer Webb found that

> [T]he District provided Ms. T. with notice of its need for a medical examination that is required by 34 C.F.R. § 300.503, and all that was practically possible, under the circumstances. Shelby does have a rare disorder that is unknown to many doctors, much less lay ARD committee members. The specific procedures to be employed in a medical evaluation need not have been contained in the notice in order for the requirements of IDEA to be satisfied.

Document No. 10 ex. A, 9.

The Fifth Circuit has held that procedural defects alone do not constitute a violation of the right to a FAPE unless they result in the loss of an educational opportunity.

Adam J., 328 F.3d at 811-13. *Accord DiBuo v. Board of Educ. of Worcester County*, 309 F.3d 184, 190 (4th Cir. 2002) (explaining that "under our circuit precedent, a violation of a procedural requirement of the IDEA (or one of its implementing regulations) must actually interfere with the provision of a FAPE"); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001) ("[A] procedural violation of the IDEA is not *a per se* denial of a FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents."); *T.S. v. Indep. Sch. Dist. No. 54*, 265 F.3d 1090, 1095 (10th Cir. 2001) ("Procedural defects alone do not constitute a violation of the right to a FAPE unless they result in the loss of an educational opportunity."); *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23, Missoula, Mt.*, 960 F.2d 1479, 1484 (9th Cir. 1992) ("Procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of an educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE.") (internal citations omitted). One well considered opinion has held that the regulations governing the contents of a school district's notice "must be interpreted in the context of the IDEA's procedural protections, particularly the right to a due process hearing . . . [,] [which is] the Act's primary procedural protection for parents." *Kroot v. District of Columbia*, 800 F. Supp. 976, 982 (D.D.C. 1992). *See also Shaw v. District of Columbia*, 238 F. Supp. 2d 127, 137-38 (D.D.C. 2002). *Kroot* observed that "[t]he purpose of the notice is to provide sufficient information to protect the parents' rights under the Act" and

to "enable . . parents to make an informed decision whether to challenge the [District of Columbia Public School System]'s determination and to prepare for meaningful participation in a due process hearing on their challenge." *Id.*

Plaintiffs have not established that any procedural deficiency resulted in the loss of an educational opportunity or otherwise compromised any of Plaintiffs' rights under the IDEA. Indeed, Ms. Thomas participated in CISD's comprehensive due process hearing that was conducted for two days and is reported, along with the pleadings and exhibits, in three volumes of material. She was represented at the due process hearing by able counsel, and submitted numerous exhibits from Shelby's educational file—thereby indicating that she received these items from CISD in time to prepare for the hearing and to present them at the due process hearing. As Plaintiffs have failed to create a genuine issue of material fact that the Notice denied Ms. Thomas's "primary procedural protection[,]" *Kroot*, 800 F. Supp. at 982, the Court concludes that the Notice provided to Ms. Thomas by CISD did not violate her rights under the IDEA. Cf. *Smith v. Henson*, 786 F. Supp. 43, 45-46 (D.D.C. 1992) (holding that notices sent by the District to parents, in which a 15-day time limit was imposed regarding the parents' rights to request a due process hearing, when in fact the IDEA contains no such time limit, "violated [the parents'] due process rights under the IDEA," and explaining further that "[a] misleading notice of that kind violates the procedural right afforded by the IDEA regardless of any actual prejudice."). Accordingly, CISD is entitled to summary

judgment affirming Hearing Officer Webb's finding that CISD provided to Ms. Thomas Notice of Evaluation as required by the IDEA.[8]

4. *Plaintiffs' Remaining Constitutional Claims*

Finally, Plaintiffs allege that CISD violated their procedural due process rights under the 14th Amendment by failing to provide adequate notice to Ms. Thomas so that she could give her informed consent to CISD's request for a medical evaluation of Shelby. Plaintiffs allege further that CISD violated Plaintiffs' 14th Amendment rights to privacy and family integrity. The Fifth Circuit has joined the Sixth, Eighth and Tenth Circuits in holding that although an IDEA plaintiff can assert claims under other laws, when an administrative decision "is upheld on judicial review under IDEA, principles of issue and claim preclusion may properly be applied to short-circuit redundant claims under other laws." *Pace*, 325 F.3d at 621 (citing cases). Hence, given that Plaintiffs' IDEA challenges to the adequacy of the Notice given by CISD have been rejected, preclusion is proper and

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8. Plaintiffs' additional argument that CISD's notice was insufficient under the IDEA because it failed to give Ms. Thomas "informed consent" is without merit. Ms. Thomas did not consent to CISD's Notice of Evaluation, and hence CISD was required to pursue the IDEA's due process procedure to override her refusal. This is not a case, for example, where Ms. Thomas gave consent and is now claiming that the consent was not "informed." She did not consent at all. The provisions of the IDEA and its regulations regarding informed consent are therefore not implicated in this case or by Officer Webb's decision.

Appendix B

CISD is entitled to summary judgment on Plaintiff's 14th Amendment procedural due process claims. *Id.*[9]

Further, although the right to familial privacy and integrity is a form of liberty guaranteed by the due process clause of the Fourteenth Amendment, *see Stanley v. Illinois*, 92 S. Ct. 1208 (1972), Plaintiffs have failed to demonstrate a genuine issue of material fact that these rights were violated. *See, e.g., Morris v. Dearborne*, 181 F.3d 657, 667-68 (5th Cir. 1999) (finding that a teacher's fabrication of sexual abuse against a student's father and placement of that student in foster care "shock[ed] the contemporary conscience" so as to violate substantive due process and the constitutional right to family integrity). There is no evidence that Ms. Thomas has been subjected to any such abusive, irrational, or malicious governmental conduct such as would "shock the conscience." To the contrary, she has been accorded full consideration in the development of Shelby's IEP and in the ARD process and has fully received due process. Accordingly, CISD is entitled to summary judgment on

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9. Even if Plaintiffs' due process claims were not barred, the undisputed summary judgment evidence shows that Ms. Thomas received a copy of CISD's Notice. The evidence also shows that Ms. Thomas attended CISD's due process hearing, was represented by able counsel, and was allowed to present evidence in opposition to CISD's request for a medical evaluation of Shelby. Hence, Plaintiffs have not raised a genuine issue of material fact that they were denied constitutional due process. *See Mathews v. Eldridge*, 96 S. Ct. 893, 901-02 (1976) ("The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner.") (quoting *Armstrong v. Manzo*, 85 S. Ct. 1187, 1191 (1965)).

Appendix B

Plaintiffs' claims for violation of familial privacy and integrity under the 14th Amendment.

III. *Order*

Based on the foregoing, it is hereby

ORDERED that Defendant Conroe Independent School District's First Amended Motion to Dismiss or, Alternatively, for Summary Judgment (Document No. 10) is GRANTED as follows: Plaintiffs' claims under the Americans with Disabilities Act, the Rehabilitation Act, and the Texas Human Resources Code, as well as the counterpart claim for discrimination and retaliation under the IDEA, are DISMISSED without prejudice as unripe because Plaintiffs have not exhausted their administrative remedies on these issues; it is further

ORDERED that the Decision of the Hearing Officer dated July 9, 2003, in Docket No. 183-SE-0203, is AFFIRMED; and it is further

ORDERED that the remainder of Plaintiffs' claims against CISD are DISMISSED on the merits.

The Clerk will enter this Order and send copies to all counsel of record.

SIGNED at Houston, Texas on this 10th day of June, 2004.

s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES DISTRICT COURT

APPENDIX C — 39 IDELR 199 BEFORE A SPECIAL EDUCATION HEARING OFFICER FOR THE STATE OF TEXAS

39 IDELR 199

103 LRP 32519

Conroe Independent School District

Texas State Educational Agency

183-SE-0203

July 9, 2003

Related Index Numbers

175.040 Other Health Impairment

185.035 Need for Evaluation

290.010 Obligation to Serve

310. MEDICAL SERVICES/MEDICALLY FRAGILE STUDENTS

355.010 Aides/Paraprofessionals

415.030 Medical Services

Judge / Administrative Officer

Stephen P. Webb, Hearing Officer

Case Summary

The guardian of an 8-year-old with dysautonomia refused consent to a district evaluation of the girl on the grounds she already provided medical information and the examination

could physically and emotionally injure the child. While the IHO understood the severity of the second-grader's condition, he ruled the district was obligated to have its own expert evaluate the child so it could determine her needs within the educational setting. There was no evidence to support the guardian's contention that the district falsified documents to support predetermined decisions, but the IHO found information that indicated the guardian and child's private physician withheld information from the district and limited discussions regarding her condition. The IHO concluded the district could not responsibly provide services to the student without its own evaluation. Her particular type of dysautonomia caused her to experience a medical crisis if the ambient temperature went above 74 degrees, and, under certain conditions, her aide would have to administer belladonna, a toxic and potentially deadly substance.

Full Text

Appearances:

Decision of the Hearing Officer

I. Statement of the Case

Petitioner Conroe ISD brings this appeal pursuant to the Individuals with Disabilities Education Act 20 U.S.C. § 1400 et seq., (hereinafter referred to as "IDEA"), against Respondent Shelby S. by next friend Kathleen T. (hereinafter referred to as "Respondent" or "Shelby"). Petitioner Conroe Independent School District (hereinafter referred to as "Petitioner" or "Conroe ISD"), filed a written request for a

due process hearing which was received by the Texas Education Agency on February 18, 2003. Petitioner was represented by Attorney Jeffrey Rogers of the law offices of Feldman & Rogers, L.L.P. of Houston, Texas. Respondent was represented by Attorney John E. Choate, Jr. of Conroe, Texas. A telephone prehearing conference was held on Thursday, February 26, 2003, at which time both parties waived their right to a final decision within forty-five (45) days of the date the written request for a due process hearing was filed. [34 C.F.R. §300.511(c)] A second prehearing conference was held on Monday, May 5, 2003 to consider Respondent's Motion to Compel Production of Documents, filed on May 2, 2003; and Respondent's Motion for Continuance filed on May 2, 2003. The parties stated during the prehearing conference that they had reached an agreement regarding the disputed production of documents and that Respondent had withdrawn her Motion for Sanctions and Motion to Compel Production. In light of the time required for the production and review of the documents the hearing proceedings were continued. A due process hearing was held on Thursday and Friday, June 5 and 6, 2003, in Conroe, Texas. The parties agreed to file post-hearing briefs on or before June 30, 2003. The deadline to file such briefs was extended to July 7, 2003, at the request of the Respondent.

Petitioner alleges that Shelby S. is an 8 year old student in the 2nd grade at Giesinger Elementary School in Conroe ISD who receives special education placement, programs and services on the basis of meeting eligibility criteria as a student who is other health impaired ("OHI"), specifically, Shelby has Disautonomia.

Petitioner asserts that Shelby's guardian refuses to send her to school because she claims that Shelby's fragile medical

condition requires Shelby to attend school with her guardian. Petitioner believes that Conroe ISD can and should provide Shelby with all services she requires to receive a free appropriate public education and does not agree that her guardian needs to be present in order for it to do so. Petitioner asserts that Respondent's guardian's suit in federal court is unrelated to the issues of this case. Petitioner has filed a motion to dismiss that action and expects that the Court will grant its motion. Petitioner asserts that the medical evaluation sought in this case is not only authorized, but is required by *20 U.S.C.* §415(b)(6), 34 C.F.R. §§300.505 and 300.507(a)(1) and *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66, 119 S.Ct. 992, 143 L.Ed. 2d 154(1999).

Respondent contends that Petitioner should be denied the requested Order for medical evaluation, in part, because Conroe ISD has presented incomplete, inaccurate and misleading information to the Hearing Officer. Respondent contends that Petitioner is well aware that Shelby's specialist, Dr. Dorothy Kelly, has directed that Shelby's guardian train any of Shelby's potential caregivers. Respondent contends that the District has failed to provide Shelby with appropriate support services, in light of her medical fragility, and intends to refuse to accommodate her under the Americans with Disabilities Act and in clear violation of a court order rendered by a state family court judge. Respondent asserts that Petitioner has denied Shelby access to her education, and has falsified ARD documents to promote its pre-arranged goals and objectives. Finally, Respondent asserts that Petitioner should not be allowed to subject Shelby to another intrusive medical examination when there is a perfectly legitimate, current, medical evaluation in existence by a recognized medical specialist.

Appendix C

Respondent asserts that Petitioner's request should be dismissed, or, at least, abated. Respondent urges that Petitioner is not authorized by state or federal law to conduct a medical evaluation on Shelby over the objections of Shelby's guardian. Respondent cites Tex. Ed. Code §38.009(c) for authority and asserts that IDEA does not authorize medical evaluations under the extant circumstances. In the alternative, Respondent requests that the instant due process hearing be abated in favor of the pending suit on identical issues in federal court.

Witnesses:

For Petitioner:

Dr. Gary Clark, MD, Child Neurologist Janet Bartlett, Shelby's second grade teacher

Mary Kay Albright, Director of Special Education, Conroe ISD

For Respondent:

Kathleen T., Shelby's Grandmother and guardian

Doris Phelps, Principal of Giesinger Elementary School

Faith Casperson, RN, Head Nurse for Conroe ISD

Anita Natale, Lead Educational Diagnostician

Dr. Dorothy Kelly, M.D. Shelby's Pediatric Pulminologist

Caren Kirton, Educational Diagnostician

Cindy Shane, Conroe ISD

Theresa Blevins, Shelby's first grade teacher

Appendix C

Based upon the evidence and the argument of counsel, the Hearing Officer makes the following findings of fact and conclusions of law.

II. Findings of Fact

1. Shelby is an 8-year-old female student who resides within the Conroe Independent School District.

2. Conroe ISD is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing Shelby a free appropriate public education in accordance with the Individuals with Disabilities Education Act, 20 U.S.C.A.§1400, et seq., and State and Federal rules and regulations promulgated pursuant to IDEA.

3. Shelby is eligible for special education placement, programs and services as a student who is OHI, specifically as a student with Disautonomia.

4. Conroe ISD has never performed a medical evaluation on Shelby either to confirm the diagnosis of her condition or to determine the precise nature of her special education program, including the need for accommodations, modifications or support services.

5. Shelby's attendance at school in 2002-2003 was the first time she attempted to attend classes at school on a regular basis. In previous school years Shelby was home schooled and only visited her class at school during socialization visits that lasted a matter of hours each visit. Shelby visited her class approximately four times during the 2001-2002 school year.

6. During the 2001-2002 school year Shelby received homebound educational services for the entire year with socialization visits to the class accompanied by her designated aide, Ms. T. Prior to the start of the 2002-2003 school year, there was no agreement by Shelby's ARD committee that Ms. T. (or any other aide) would attend classes with Shelby at school on a daily basis.

7. Shelby attended school in her 2nd grade regular education placement for five school days of the 2002-2003 school year. She attended class on these days the first two weeks of the school year.

8. When Shelby attended her 2nd grade class for the 2002-2003 school year, her grandmother accompanied each day. Ms. T. would sit in the back of the class but would periodically go to Shelby's desk, talk to her and give her snacks. Ms. T. also called to Shelby sometimes from the back of the room. Ms. T. reviewed the desks of other children and occasionally commented to Shelby's teacher about other children. Overall, Ms. T's. presence was a disruption to Shelby's class.

9. There is a qualitative difference between Ms. T.'s daily presence in Shelby's classroom at school and Ms. T's. presence with Shelby during sporadic socialization visits. Conroe ISD did not agree to Ms. T.'s presence in class with Shelby for the 2002-2003 school year.

10. Kathleen T. is Shelby's guardian and managing conservator. She is the person who has cared for her since Shelby was an infant and who has consulted with Shelby's medical specialist since Shelby was an infant.

11. Ms. T. is Shelby's primary caregiver. She is the person who is most familiar with Shelby's physical cues which precede a disautonomic crisis and she is the person most experienced in responding to such a crisis.

12. Ms. T. sometimes left Shelby's class while Shelby remained in class. Her absences would last a few minutes to an hour.

13. Ms. T.'s presence in Shelby's classroom was determined to be unsatisfactory by the administration of Shelby's school. Ms. Doris Phelps, principal of Giesinger Elementary, informed Ms. T. that she could no longer attend Shelby's class with her. She also threatened to have Ms. T. removed from the school if she attempted to accompany Shelby to her class.

14. As a result of the encounter between Ms. T. and Ms. Phelps, Shelby did not return to her 2nd grade class. She received instruction for the remainder of the school year as a homebound student.

15. Ms. T. is concerned about Shelby's privacy. She intentionally limits the medical information pertaining to Shelby's condition that is given to the District. She is concerned about the number of District employees who are familiar with Shelby's condition and specifically limits the access between Shelby's specialist and members of Shelby's ARD committee.

16. Dr. Gary Clark is a licensed Child Neurologist who is familiar with Disautonomia. He has treated two or three patients who have familial generalized Disautonomia.

Appendix C

17. Dr. Clark has not reviewed Shelby's medical records or examined Shelby. In order to make recommendations to Conroe ISD, he would have to review her medical records, review past diagnostic tests for Shelby and perform a medical examination of her.

18. In Dr. Clark's experience, the family or caregivers of patients with Disautonomia typically know the triggering factors, initial symptoms and early remedies for the numerous medical crises that such patients experience. These crises will strike the disautonomic patient for no apparent reason and with little early warning to the observer unfamiliar with the patient's physical "cues." Because early detection is critical to an effective response to a crisis, the family or caregiver should be consulted when a disautonomic patient is examined, treated or attended by someone other than the family or caregiver.

19. A patient with a compromised autonomic system can experience an adverse reaction to temperature extremes, emotional stressors, or other stimuli.

20. Dr. Clark prefers to perform an independent evaluation rather than attempt to confirm Shelby's existing treatment. In his professional opinion, he can perform such an evaluation without injuring Shelby. He anticipates that a suitable examination would last approximately one hour.

21. With Disautonomia, every patient exhibits distinct symptoms from other patients. It is important that Shelby's caregiver be familiar with Shelby's unique physical cues and the appropriate response to a physical crisis.

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22. Shelby's most significant trigger is heat. Shelby should be maintained in an ambient exterior temperature range of 68 -72 degrees. If Shelby is subjected to temperatures in excess of 74 degrees for more than 15 minutes, she could experience a medical crisis.

23. Shelby's medical condition has improved as she has aged. When she was under two years of age, she was subject to medical crises three to five times a day. During such crises, Shelby could lose consciousness and experience cardiac arrest. While Shelby is no longer as medically fragile as she once was, she still cannot control her own body temperature, is still subject to sudden medical crises, and is examined by her doctor 52 times each year.

24. Dr. Dorothy Kelly, MD. is a Pediatric Pulminologist and specialist in Shelby's autonomic nervous system disorder. Dr. Kelly currently treats 30-35 patients who are challenged by Disautonomia. Since 1975, Dr. Kelly has treated approximately 200 patients with Disautonomia.

25. Dr. Kelly is not familiar with Shelby's educational needs or the requirements of Shelby's ARD committee. In fact, Dr. Kelly was unaware that Shelby was in special education.

26. It is Dr. Kelly's professional opinion that a suitable aide for Shelby can be trained in 2-4 weeks. She would like to consult with the prospective aide prior to such aide beginning service. Once in service, Dr. Kelly recommends that Shelby's aide not leave her presence for more than 15-20 minutes. The properly trained aide should be qualified

to administer controlled substances to Shelby in the event of a crisis, in under 2 minutes from the start of the crisis.

27. The "Emergency Protocols" for responding to a potential health crisis that were developed by Shelby's ARD committee, were not acceptable to Dr. Kelly, for medical reasons. The protocols required, among other things, that the medication that Shelby needed to respond to a classroom medical crisis be kept in the school's nurse's office and be administered by a licensed school nurse. Dr. Kelly felt that the medication should be kept with the classroom aide so that the response time would be reduced to 2-3 minutes.

28. In a fax communication to Giesinger Elementary, dated August 28, 2002, Dr. Kelly identified Ms. T. as Shelby's designated healthcare giver. She also gave instructions to the school that Ms. T. was to train an appropriate classroom aide for Shelby and Ms. T. would verify to Dr. Kelly when she was ready for Ms. T. to leave the classroom, Dr. Kelly would then approve the designated aide. Dr. Kelly also specified that any other alternate aide would be trained by Ms. T. and subject to the same verification and approval process. Dr. Kelly also directed the school to allow Ms. T. access to Shelby upon her request and for Ms. T. to be called immediately if Shelby requested her. Finally, Dr. Kelly directed that District aides were to "take heed of Ms. T.'s information and experience dealing with Shelby's healthcare needs."

29. By the design of Ms. T. and Dr. Kelly, there was not a free exchange of information between Shelby's ARD committee and Dr. Kelly about Shelby's medical needs or medical accommodations in school.

30. On August 16, 2002, an ARD meeting was convened on Shelby's behalf. A consensus was reached regarding Shelby's individualized education program, her placement, classroom modifications, and related services. The ARD committee was given written information about Shelby's special health needs and requirements. It was agreed that additional support staff would be in Shelby's classroom and outside. It was agreed that Ms. T. would be notified when Shelby had been administered Belladonna. It was agreed that special transportation would be initiated for Shelby on September 3, 2002, and that Ms. T. would bring her to school until that time.

31. On September 6, 2002, Ms. T. was sent a written notice of the District's request for an outside evaluation of Shelby by an autonomic specialist. The notice stated that further data was requested by Shelby's ARD committee and techniques and strategies and Shelby's need for specialized personnel and health care had been tried. Ms. T. refused consent on September 6, 2002, stating that she did not know what process the autonomic specialist would use.

32. On November 1, 2002, an ARD meeting was convened on Shelby's behalf. The ARD committee addressed the need for Ms. T. to be present in Shelby's classroom as her aide as opposed to being outside Shelby's classroom observing Shelby working with another aide. No consensus was reached at this ARD meeting.

33. Ms. T. objects to a District medical evaluation of Shelby because she believes that she has provided the District with sufficient medical information about Shelby for the

District to educate her; that the District's request is retaliatory in motivation; that Shelby would be stressed by being examined by another doctor, particularly a male doctor and could be injured emotionally or physically by the examination; and that it is her right to decide Shelby's medical care and treatment. Ms. T. asserts that Shelby's right to medical privacy is paramount and entitles her to determine what medical information the District actually needs to know.

34. On September 6, 2002, an ARD meeting was convened on Shelby's behalf, recessed and reconvened on September 26, 2002. The purpose of the ARD was to address modifications that were not addressed at the August 16, 2002 ARD meeting. The ARD committee discussed the need for a specially trained aide to be in the classroom with Shelby and the need for Ms. T. to train the aide. When the ARD committee asked to speak to Dr. Kelly to determine the details of Shelby's classroom modifications, the permission was limited to 14 specific questions that were subject to Ms. T.'s prior approval. Ms. T. edited Dr. Kelly's responses to the 14 questions before the answers were provided to the school. A re-evaluation plan was written to request a physical therapy evaluation and for the District to conduct an outside medical evaluation by a Disautonomia specialist by December 1, 2002.

35. On September 26, 2002, during a reconvened ARD for Shelby, Ms. T. gave consent for only School Nurse Faith Casperson and Shelby's 2nd grade teacher, Janet Bartlett to talk to Dr. Kelly for the limited purpose of obtaining information for educational purposes and not to get a prognosis.

Appendix C

36. There is no credible evidence in this records that any documents associated with any of Shelby's ARD meetings were falsified or inappropriately altered by any person.

37. There is no credible evidence in this record that Shelby's ARD meetings were subverted by inappropriate actions of employees of Conroe ISD.

III. Discussion

Conroe ISD seeks authority to perform a medical examination on Shelby S. an 8 year old girl who suffers from a rare disorder, over the objection of Shelby's guardian. Shelby has a disability to her autonomic system which is known as disautonomia. The disorder makes Shelby medically fragile, because she is subject to sudden classroom medical "crises" that could result in unconsciousness, cyanosis, cardiac arrest and death. She requires a specially trained aide to accompany her in class who can determine the onset of a medical crisis and perform intervention, which includes administering belladonna. Shelby's condition makes her eligible for special education under other health impaired ("OHI") eligibility classification.

A student with such extreme symptoms would logically require extensive cooperation and coordination between school personnel and the student health care providers. In order to know how to serve a student with such medical needs, the student's ARD committee should access the student's medical history and the student's specialist, at a minimum. The necessary and appropriate responses to the

disability would be revealed by the information derived from a medical evaluation.

This record shows that Conroe ISD attempted to learn as much about Shelby as it could, with limited success. Shelby's guardian limited the medical information about Shelby that the District could learn. Members of Shelby's ARD committee were not allowed free access to Shelby's specialist, Dr. Dorothy Kelly. Ms. T. took the extraordinary step of scripting the main encounter between Dr. Kelly and Shelby's ARD committee with 14 pre-approved questions. Even more extraordinary was Dr. Kelly's willingness to allow Ms. T. to edit Dr. Kelly's answers to the ARD committee's questions. Apparently motivated by the desire to protect Shelby's privacy, Ms. T. and Dr. Kelly prevented the free exchange of information about a student with life threatening medical needs that were unknown to everyone except a handful of Shelby's closest caregivers and Dr. Kelly. It is little wonder that the school and the ARD committee developed emergency support services that were unacceptable to Dr. Kelly.

It is a bit of an understatement to say that Dr. Kelly was not familiar with what accommodations were necessary to satisfy Shelby's medical and educational needs. Dr. Kelly did not know that Shelby was in special education. She seemed not to know what special education was. Because she had not worked with Shelby's ARD committee, it probably did not occur to her that a public school would want to maintain a poisonous substance (belladonna) in a secure nurse's office to be administered by a certified nurse in a class of 2nd grade students, rather than maintained by an

aide trained by a non-District employee. Dr. Kelly's written edicts to the school about how only she and Ms. T. would train and approve Shelby's aides, how the aide would defer to Ms. T., and how the school should respond to requested access between Ms. T. and Shelby, do not indicate an emphasis on cooperation and coordination.

The unfortunate confrontation between Ms. T. and Geisinger Principal, Doris Phelps exacerbated a flawed educational relationship between Shelby's caregivers and educators and created irrelevant issues in this case. Ms. T.'s disruptive five days in Shelby's classroom apparently prompted Ms. Phelps to exercise dubious judgment in attempting to keep Ms. T. out of Shelby's classroom, Ms. T. was Shelby's designated caregiver and the only adequately trained aide. That much information was available to Ms. Phelps when she intervened. If Ms. T. had acquiesced to Ms. Phelps demand, Shelby's well-being could have been jeopardized.

Nevertheless, it is irrelevant to Petitioner's request in this case that Ms. T. was barred from Shelby's classroom. An allegation of a failure to implement an existing IEP was not made and would have no bearing on the right of the District to evaluate Shelby. There is no persuasive evidence in this record that the ARD committee approved Ms. T. as Shelby's classroom aide, or that past socialization visits during the 2001-2002 school year have any rational relationship to prior ARD approval of Ms. T. as Shelby's aide.

Appendix C

Ms. T.'s allegations that she was not an equal participant in the ARD process are also irrelevant to the District's right to evaluate. The record shows that Ms. T. was allowed to participate in the process. She made hour long presentations at ARD meetings, provided medical information to the ARD committee, and even hosted ARD meetings at her home. Shelby's August 16, 2002 ARD meeting, wherein her IEP was developed, was a consensus meeting. Ms. T.'s dissatisfaction with the ARD process seemed to begin with the conflict with Ms. Phelps. The process was far from the sham which would have compromised the ARD committee's request for its own evaluation. The allegations of falsified ARD documents were not supported by the record.

During prehearing conferences, the parties were informed that this Hearing Officer considered the Fifth Circuit's holding in *Andress v. Cleveland Independent School District*, 64 F3rd 176 (5th Cir. 1995) to be controlling case law. In that case the court flatly held that ". . . there is no exception to the rule that a school district has right to test a student's eligibility under IDEA" (*Andress* at pp 178-179).[1] The Court made this ruling in a case where the student's parents contended that the District's testing would possibly harm the student, as was asserted in this case by Ms. T. In the face of conflicting or missing information about Shelby's eligibility for specific accommodations and support services, the District was almost obligated to augment its information in order to develop an IEP which would met Shelby's unique educational needs.

1. My decision in this case is consistent with the decision in *Spring Branch ISD v. Danny R.b/n/f Elan R.*, Docket No. 077-SE-1001 (February 4, 2002).

I find that the District provided Ms. T. with notice of its need for a medical examination that is required by 34 C.F.R. §300.503, and all that was practically possible, under the circumstances. Shelby does have a rare disorder that is unknown to many doctors, much less lay ARD committee members. The specific procedures to be employed in a medical evaluation need not have been contained in the notice in order for the requirements of IDEA to be satisfied.

Respondent's argument that *Andress* decision is inapplicable to this case is wholly unpersuasive. Shelby's eligibility for special education was at issue. The limits of her disability were unknown to her ARD committee because of the limits of the medical information made available to her ARD Committee. Special education includes related services. The need for related services and an aide was directly in question. It is illogical for Respondent to argue that a medical examination needed to gather information to train Shelby's aide is not authorized by IDEA or its implementing regulations. This is especially true since the sufficiency of the training of Shelby's classroom aide (whether the person was Ms. T. or someone trained by Ms. T.) caused this controversy. The Petitioner's cited authority of *Dept. of Educ. State of Hawaii v. Rae*, 158 F. Supp. 2d 1190, 1198 (D. Haw., 2001); 237 F. 3d 813, 817 (7th Cir. 2001), *cert. denied*, 534 U.S. 1157 (2002), is applicable in this case.

In short, this case is an example of the wisdom of the *Andress* ruling and IDEA's preservation of a local education agency's right to evaluate a special education student. Shelby's privacy is important, as is Ms. T.'s right to make

decisions about Shelby's medical treatment. However, the District is obligated to provide a free and appropriate public education to Shelby based on complete information. It may be difficult for the District to find a doctor as expert on Shelby's disorder as is Dr. Kelly; but, if Dr. Kelly cannot or will not discuss Shelby's special needs with the people responsible for Shelby's daily security and education, the District is obligated to try.

IV. Conclusions of Law

1. Shelby S. is a student in Conroe ISD who is eligible for special education services based on her classification as a student with Disautonomia. 20 U.S.C.A. §1401(3); 34 C.F.R. §300.7; 19 T.A.C. §89.1040

2. Petitioner Conroe ISD has a responsibility to provide Shelby with a free appropriate public education. 20 U.S.C.A. §1412; 34 C.F.R. §300.300; 19 T.A.C. §89.1001

3. Petitioner Conroe ISD proved that there is a need for it to perform a medical examination on Shelby in order to develop and implement a special education program for Shelby that includes appropriate accommodations and support services.

4. Conroe ISD appropriately discussed its need to conduct a medical examination on Shelby with Shelby's guardian. Conroe ISD provided sufficient notice to Shelby's guardian under 34 C.F.R. §300.503.

5. Respondent failed to show why Conroe ISD should not be allowed to perform a medical evaluation on Shelby.

V. Order

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer ORDERS that the relief sought by Petitioner is GRANTED.

Finding that the public welfare requires the immediate effect of this Final Decision, the Hearing Officer makes it effective immediately.

The district shall timely implement this decision within 10 school days in accordance with 19 TAC §89.1185(q) and 34 CFR §300.514. The following must be provided to the Division of Complaints Management at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this decision: 1. documentation demonstrating that the decision has been implemented; or 2. if the timeline set by the Hearing Officer for implementing certain aspects of the decision is longer than 10 school days, the district's plan for implementing the decision within the prescribed timeline, and a signed assurance from the superintendent that the decision will be implemented.

Appendix C

Statutes Cited

20 USC 1415(b)(6)
20 USC 1401(3)
20 USC 1412

Regulations Cited

34 CFR 300.511(c)
34 CFR 300.505
34 CFR 300.503
34 CFR 300.7
34 CFR 300.300

Cases Cited

526 U.S. 66
158 F. Supp. 2d 1190
237 F.3d 813

(2)

Supreme Court, U.S.
FILED
NOV 13 2006
OFFICE OF THE CLERK

No. 06-438

IN THE

Supreme Court of the United States

SHELBY S., a minor by and through her Conservator and next friend, KATHLEEN T.,

Petitioners,

v.

CONROE INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

JEFFREY L. ROGERS
FELDMAN & ROGERS, L.L.P.
5718 Westheimer, Suite 1200
Houston, Texas 77057
(713) 960-6000

Attorney for Respondent

204428

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

May a parent deny a public school district the opportunity to evaluate the special education and related services a child needs under the Individuals with Disabilities Education Act and force it instead to provide the educational program the parent unilaterally determines to be appropriate?

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Shelby S. b/n/f Kathleen T. v. Conroe Indep. Sch. Dist., No. H-03-4184 (S.D. Tex. June 10, 2004).

Conroe Indep. Sch. Dist., v. Shelby S. b/n/f Kathleen T., Docket No. 183-SE-0203 (SEA Tex. July 9, 2003).

LEGAL PROVISIONS INVOLVED

The text of the cited provisions are set out in the Appendix to Respondent's Brief in Opposition to Petitioner's Petition For a Writ as it was not contained in the Petitioner's Appendix as required by Supreme Court Rule 14.1(f).

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STATEMENT OF THE CASE

The material facts are not in dispute. Shelby has a life-threatening medical condition which entitles her to special education and related services under the Individuals with Disabilities Education Act ("IDEA"). Shelby resides with her grandmother, Kathleen T., in the Conroe Independent School District in Conroe, Texas. Prior to the 2002-2003 school year (her second grade year), Shelby received educational services from the school district in Kathleen T.'s home and only made brief visits to the school for "socialization." Although she allowed Shelby to attend school at the beginning of that year, Ms. T. insisted that she must attend school with Shelby because her presence was necessary in order to provide potentially life saving support. Unfortunately, it quickly became apparent that Ms. T.'s presence in the classroom was extremely disruptive to the education of Shelby and the other students. She was directed by the school principal to refrain from attending class with Shelby. Ms. T. responded by providing a letter to the school from Shelby's private physician stating that Ms. T. needed to attend class with Shelby for medical reasons until Ms. T. could train another person to attend to Shelby's healthcare needs.

Concerned for Shelby's safety, school personnel requested permission to speak directly with Shelby's physician regarding

the extent of her need for supportive services in the classroom. Ms. T. refused to give consent. Instead, she required the school to put its questions in writing. Ms. T. revised the proposed list of questions so that it included only the questions she preferred. She then indicated that she would only allow a few school district employees, selected by her, to have a phone conference with the doctor regarding the written questions. She refused to allow open communication during the conference with the doctor, who merely provided responses to the questions Ms. T. had selected.

Frustrated by its inability to obtain unfettered access to Shelby's physician and conflicting information it had received from Ms. T. regarding the precise nature and extent of Shelby's healthcare needs, the school district requested permission to do its own medical evaluation. Ms. T. refused. After continuing to attempt to obtain specific information from Shelby's physician, the school district was ultimately forced to file a request for a special education due process hearing to override Ms. T.'s refusal to consent to the evaluation.

The hearing was held, and the hearing officer admitted 351 pages of exhibits and listened to two days of testimony on the narrow issue of whether the District had the right to conduct the evaluation with personnel of its own choosing. Significantly, during the hearing, Shelby's physician testified that she was completely unaware that Shelby was a special education student and that she had allowed Ms. T. to draft her letters to the school regarding Shelby's medical needs. At the conclusion of the hearing, the hearing officer issued a decision granting the school district the right to evaluate Shelby over Ms. T.'s objections. In fact, he found that due to Ms. T. and Shelby's physician's actions, the limits of Shelby's

disability were unknown to the school, leaving it at an extreme disadvantage in attempting to determine what supportive services Shelby needed in order to safely attend school. Relying on the Fifth Circuit's decision in *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176 (5th Cir. 1995), *cert. denied*, 519 U.S. 812 (1996), he concluded that the facts of the case supported the district's right to conduct the evaluation. In fact, the hearing officer concluded that "in the face of conflicting or missing information about Shelby's eligibility for specific accommodations and support services, the district was almost obligated to augment its information in order to develop an Individual Education Plan ("IEP") which would meet Shelby's unique educational needs."[1]

The District Court and the Fifth Circuit affirmed the school district's authority to conduct the evaluation it properly determined was needed to ensure that Shelby received a free appropriate public education in a safe educational environment. An opposite result would be

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1. Under the IDEA, special education students receive individualized instruction in accordance with an Individual Education Plan ("IEP") developed by a team comprised of school administrators, teachers, and the child's parents. See 20 U.S.C. §§ 1401(11), 1414(d); § 1401(14) (2004). In Texas, the team is referred to as the Admissions, Review & Dismissal ("ARD") Committee. 19 T.A.C. § 89.1050; s*ee also Cypress-Fairbanks Indep. Sch. Dist v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 346 (5th Cir. 2000), *cert. denied*, 531 U.S. 817, 121 S. Ct. 55 (2000). The IEP includes an assessment of the present performance of the child, his annual goals and short-term instructional objectives, the extent to which the child can participate in regular programs, the projected initiation date and anticipated duration of the program, and the procedures for determining whether the instructional objectives are achieved. 20 U.S.C. § 1414(d)(1).

tantamount to allowing Ms. T. to dictate to the school the nature of the supportive services the school district is required to provide to Shelby under the IDEA. In the face of threats from Ms. T. that the failure to provide appropriate services could lead to Shelby's death, the evaluation proposed by the school district was clearly reasonably related to the performance of its duty under the IDEA.

Pursuant to Supreme Court Rule 12(2), the following are misstatements of fact in Petitioner's factual recitation of this case:

- Petitioner implies that Ms. T. was excluded from the classroom due to the complaints she made regarding the implementation of Shelby's modifications. Petition for a Writ at p. 9. In reality, Shelby's teacher testified that Ms. T.'s behavior in the classroom was disruptive to the learning of Shelby and the other students. The hearing officer found as a matter of fact that the school administration excluded Ms. T. from class when it determined her presence there was unsatisfactory.

- Petitioner argues that the evidence presented at the due process hearing establishes that the District's expert, Dr. Gary Clark, could not have safely evaluated Shelby. Petition for a Writ at p. 11. However, a finding in support of this assertion was not made by the hearing officer, the district court, or the Fifth Circuit. To the contrary, Dr. Clark, a licensed child neurologist familiar with Dysautonomia, testified that he was confident that he could safely perform an evaluation of Shelby's needs.

- Petitioner argues that the hearing officer demonstrated bias because he failed to consider her argument that the requested evaluation was not warranted and could be harmful. Petition for a Writ at p. 12. This argument is belied by the record and the fact that the hearing officer admitted hundreds of pages of d cuments and elicited testimony on his own regarding the potential harm of the evaluation.

SUMMARY OF THE REASONS FOR DENYING THE PETITION

The only issue presented for review is a claim by Kathleen T. that her constitutional right to the care, custody, and control of her child is violated by the holding of the Fifth Circuit. The Court should deny the Petitioner's Petition for a Writ of Certiorari because Kathleen T. did not properly perfect an appeal to the Fifth Circuit in her individual capacity and her claims were not considered by the Fifth Circuit. Thus, she may not appeal to this Court. Additionally, the Fifth Circuit's determination that the IDEA authorizes a school district to conduct a medical evaluation of a student to assess the child's special education needs is not constitutionally problematic because Kathleen T. is free to decline special education for Shelby rather than consent to the evaluation.

The Fifth Circuit has, again, correctly interpreted the IDEA. In *Andress*, the Fifth Circuit held that school districts have an absolute right under the IDEA to conduct evaluations with personnel of its own choosing. 64 F.3d at 178-79. The court stated there was no exception to the rule. This Court denied a petition for a writ in that case. There are no conflicting opinions from any Federal Circuit or District

Court. In this case, the Fifth Circuit articulated what was implicit in *Andress*; as long as a school district has "reasonable grounds" for requesting the evaluation in the first instance, it is permissible under the IDEA. This interpretation of the provisions of the IDEA does not implicate the constitutional rights of Kathleen T.

Lastly, assuming *arguendo* that Kathleen T. has standing and that the action complained of is State action, the evaluation is not constitutionally impermissible because a parent's right to the care, custody, and control of their child is not absolute in the educational arena. While parents retain the right to determine *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child.

REASONS FOR DENYING THE PETITION

I. Ms. T. Waived Her Right to Bring Claims on Her Own Behalf.

The Fifth Circuit did not consider any claims Ms. T. asserted in her individual capacity because she did not perfect an appeal from the district court in that capacity. A party seeking appellate review must comply with Rule 3 of the Rules of Appellate Procedure. That rule provides, in relevant part, that the notice of appeal must specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A,B, et al.," or "all defendants except X". . . . Fed. R. App. P. 3(c)(1)(A). While courts generously construe documents to satisfy the requirements of the Rule, this principle of liberal construction

does not excuse compliance with the Rule. *See Smith v. Barry*, 502 U.S. 244, 248 (1992). The purpose of the Rule is to provide sufficient notice to other parties and the courts. *United States v. Glover*, 242 F.3d 333, 336 (6th Cir. 2001). The advisory committee notes to Rule 3 indicate that "[t]he test established by the rule for determining whether such designations are sufficient is whether it is objectively clear that a party intended to appeal." Fed. R. App. P. 3(c) advisory committee note.

In the district court, the Petitioner's Original Complaint was styled "Shelby S. b/n/f Kathleen T., Plaintiffs" and asserted claims exclusively under the IDEA on Shelby's behalf. Subsequently, Petitioner's attorney filed a First Amended Complaint and styled the case "Shelby S. b/n/f Kathleen T., Kathleen Thomas, Individually, Plaintiffs." In that Complaint, Petitioner's attorney pleaded causes of action on behalf of both Shelby and Ms. T. under the IDEA, Section 504 of the Rehabilitation Act (29 U.S.C. § 794), Section 1983 based on violations of the 14th Amendment to the United States Constitution, and 42 U.S.C. § 2000d for attorneys' fees. The parties briefed the issues in multiple motions, responses and replies. The district court, noting that Ms. T. was suing in her own behalf and as next friend of Shelby, granted the school district's Motion for Summary Judgment. It affirmed the hearing officer's decision in favor of CISD and dismissed Kathleen T.'s constitutional claims on the merits.

The Notice of Appeal to the district court was styled "Shelby S. b/n/f Kathleen Thomas, Plaintiffs." The text of the Notice reads: "Notice is hereby given that Shelby S. by next friend Kathleen Thomas, Plaintiffs in the above-named cause, hereby appeal . . . ." When the Fifth Circuit Clerk's

Office received the Notice of Appeal, it issued a Caption Sheet which indicated that Shelby S. was the sole Plaintiff-Appellant. The style of the case read: "*Shelby S. by next friend Kathleen T, Plaintiff-Appellant, v. Conroe Independent School District, Defendant-Appellee.*" Although the parties briefed the issues raised on behalf of both Shelby and Kathleen T., it is apparent that the Fifth Circuit found that Kathleen T. had not properly perfected an appeal in her individual capacity because it did not address her claims. No objections were made to the style of the case in writing or at oral argument. The appellate court had a duty to *sua sponte* consider whether it had jurisdiction over the claims before it. *See Griffith v. Johnston*, 899 F.2d 1427, 1429 (5th Cir. 1990). The first sentence of the Court's opinion states, "Plaintiff-Appellant Shelby S. ("Shelby") appeals the district court's grant of summary judgment in favor of Defendant-Appellee Conroe Independent School District ("CISD")." The Notice of Appeal did not make it sufficiently clear to the Fifth Circuit that Kathleen T. intended to appeal any claims in her individual capacity. She cannot now seek certiorari on claims that she did not properly appeal to the Fifth Circuit.

II. The Fifth Circuit Correctly Interpreted the IDEA.

The Fifth Circuit correctly determined that the IDEA permits a school district to conduct an evaluation of a child's special education needs if it can articulate reasonable grounds for the necessity of the evaluation. The IDEA makes grants to States to assist them in providing eligible children with a free appropriate public education ("FAPE"). 20 U.S.C. § 1400(d)(1)(A).[2]

2. A recent reauthorization of the IDEA became effective on July 1, 2005, after the request for due process hearing was filed, heard and decided. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647, (Cont'd)

A FAPE is defined by the Act to mean "special education and related services that are . . . provided in conformity with the individualized education program required under section 1414(d) of this title." 20 U.S.C. § 1401(8); § 1401(9) (2006). Pursuant to the IDEA, school districts must create an individualized education plan ("IEP") for each child with a qualifying disability. 20 U.S.C. § 1414(d). The IEP is the central vehicle by which school officials and parents collaborate to meet the child's special needs in the educational environment. *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528, 532 (2005).

Before a child may begin receiving special education services the school district must conduct a full and individual evaluation. 20 U.S.C. § 1414(a)(1)(A). Subsequent evaluations must be conducted "if conditions warrant a reevaluation or if the child's parent or teacher requests a reevaluation, but at least once very 3 years." 20 U.S.C. § 1414(a)(2)(A). As part of an initial evaluation or reevaluation, the IDEA mandates that the IEP Team and other qualified professionals review existing data and on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine (1) the child's eligibility classification, (2) her present levels of performance, (3) her need for special education and related

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(Cont'd)

2803(codified as amended at 20 U.S.C. § 1400 *et seq.*). Consequently, the statutory citations are to the previous IDEA provisions. *See* 20 U.S.C. § 1400 *et. seq.* (1997). Although the Respondent does not believe that any of the changes in the law affect the issues in this case, for the Court's convenience, parallel citations are made to the new IDEA only when the citation changed, as follows: § ____ (2004). Likewise, new implementing regulations have also been promulgated. A parallel citation to the new regulations will be provided when necessary and cited as follows: § ___ (2006).

services (as in this case), and (4) her need for modifications. 20 U.S.C. § 1414(c)(1), (2).

According to the Federal Regulations, "related services" means "such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and *medical services for diagnostic or evaluation purposes.*[3] The term also includes school health services, social work services in schools, and parent counseling and training. 34 C.F.R. § 300.24(a) (emphasis added); § 300.34(a)(2006).

If the IEP Team determines that additional data are needed, the responsibility for conducting the evaluations to produce the needed data is expressly placed on the school district. *See* 20 U.S.C. § 1414(a)(1)(A), & (a)(2). Equipped with complete evaluation data the ARD committee can develop the IEP envisioned by the Act. *See Patricia P. v. Bd. of Educ. of Oak Park*, 203 F.3d 462, 468 (7th Cir. 2000) (recognizing that school districts need proper evaluations to develop IEP's).

In its opinion in the case at bar, the Fifth Circuit merely articulated what was implicit in *Andress*, that is, that the requested evaluation must be reasonably calculated to

3. Petitioner indicated in her Petition for Writ that medical services only qualify as related services if they are for diagnostic purposes and omitted the reference to evaluation purposes. Petition for a Writ at p. 4.

produce the information needed to establish the child's eligibility and develop his IEP.[4] It is not permitted to arbitrarily request evaluations that will not aid the ARD Committee. In *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 73 (1999), this Court explained that a school district has a duty under the IDEA to provide such supportive services to a child as may be necessary to allow the child to remain in school even though the services may be medical in nature. It would be incongruous to suggest that a school district has an obligation to provide services that are medical in nature but cannot evaluate the need for those services. In order to evaluate a child's needs, the implementing regulations require school districts to assess "in all areas related to the suspected disability, including, if appropriate, *health*, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. § 300.532(g); § 300.304(c)(4) (2006) (emphasis added). Furthermore, the evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. 34 C.F.R. § 300.532(h); § 300.304(c)(6) (2006).

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4. In *Andress*, the parents did not dispute that the specific evaluation requested, a psychological, would produce the data required by the Act. The parents argued only that they had already provided the District with an evaluation and that another one would be harmful to their child. *Andress*, 64 F.3d at 178.

1. There is consensus among the Circuit Courts that a school district may evaluate a student by an expert of its choice.

Every court that has considered the issue has concluded that school districts have a right to conduct evaluations by personnel of their own choosing. *M.T.V. v. DeKalb County Sch. Dist.*, 446 F.3d 1153, 1160 (11th Cir. 2006) (holding school could condition continued special education services on reevaluation by its expert); *Johnson v. Duneland Sch. Corp.*, 92 F.3d 554, 558 (7th Cir. 1996) (stating school cannot be forced to rely solely on evaluation obtained by parents); *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176, 178-79 (5th Cir. 1995) (finding nothing in the statute, regulations or case law which prevents school districts from obtaining an evaluation by personnel of its own choice); *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1315 (9th Cir. 1987) (stating that if parents want special education they must permit the school district to evaluate); *Dubois v. Conn. State Bd. of Ed.*, 727 F.2d 44, 48 (2nd Cir. 1984). The IDEA has been reauthorized on two separate occasions, 1997 and 2004, and Congress has not amended the statute to alter the result reached by these courts.

The Fifth Circuit first considered the parameters of a district's duty to evaluate in *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176 (5th Cir. 1995). In *Andress*, the Court considered the parents' argument that the requested evaluation would harm their child but concluded there was no statutory exception to the District's right and refused to create a judicial exception to the rule. *Andress,* 64 F.3d at 178-79. In fact, the Court emphasized that a parent who disagrees with the district's evaluation has a statutory right to request an evaluation by an independent evaluator, possibly

at public expense, and that the district must consider that evaluation. *Andress,* 64 F.3d at 178; 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502. Thus, the Court reasoned "it would be incongruous under the statute to recognize that the parents have a reciprocal right to an independent evaluation, but the school does not." *Id.* This Court denied the parents' request a Petition for a Writ of Certiorari in *Andress*. 519 U.S. 812 (1996).

2. The Fifth Circuit's "reasonableness" standard is consistent with the IDEA.

The standard articulated by the Fifth Circuit recognizes that, under the IDEA, school officials are accorded a high degree of deference and flexibility in determining what data it needs to develop the child's program. *See* 20 U.S.C. § 1414(c)(1) (requiring only that the district review existing evaluations before determining what additional data it needs); *see also Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989) (schools must retain significant flexibility in educational planning if they truly are to address each child's needs). When conducting evaluations the district must use tools and strategies to gather "relevant" information that "may assist" the district in determining eligibility or the contents of a child's IEP. 20 U.S.C. § 1414(b)(2). Therefore, assuming there is a reasonable relationship between (1) the determination of the child's eligibility classification, present levels of performance, special education or related services needs, or modifications needs of the child, and (2) the requested evaluation, then the district has an unconditional right to seek the requested evaluation. *See* 20 U.S.C. § 1414(c)(1)(B)(i-iv) (stating categories for which the district must acquire data). Therefore, the Fifth Circuit correctly articulated the consideration which the school must give to its evaluation requests.

III. The Evaluation Does Not Violate the Fourteenth Amendment.

The evaluation at issue does not infringe upon the constitutional rights of Shelby or Ms. T. Kathleen T. asserts a fundamental right under the Fourteenth Amendment to determine whether her child must submit to a medical evaluation. The substantive component of the Due Process Clause of the Fourteenth Amendment provides heightened protection against government interference with certain fundamental rights and liberty interests. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Although the fundamental right of a parent to the care, custody and control of their child has been long recognized, it is far from absolute, especially in the educational context. *See, e.g., Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 699 (10th Cir. 1998) (collecting cases that demonstrate "parents simply do not have a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject.").[5] As the Sixth Circuit explained:

> The critical point is this: While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school

5. For example, a state has a right to require children to be immunized as a condition to admission to public school. *Boone v. Boozman*, 217 F. Supp. 2d 938, 956-57 (E.D. Ark. 2002). States may subject home-school children to standardized testing over the parent's objection. *Murphy v. State of Arkansas*, 852 F.2d 1039 (8th Cir. 1988). Parents may not exempt their children from reading programs chosen by the district. *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

> curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school, or, as here, a dress code, these issues of public education are generally committed to the control of state and local authorities.

Blau v. Fort Thomas Public School District, 401 F.3d 381, 395-96 (6th Cir. 2005) (internal quotations omitted) (collecting cases).

Consistent with this understanding of fundamental rights in the educational context, the Eighth Circuit recently recognized that the evaluation provisions of the IDEA do not permit a school district to evaluate a private-school student if his parents refuse to consent to the testing and expressly waive all benefits under the IDEA. *Fitzgerald v. Damdenton R-III Sch. Dist.*, 439 F.3d 773, 778 (8th Cir. 2006).

Petitioner argues that a school district's ability to condition the provision of special education on the parent's consent to a medical evaluation abrogates Congress's desire to provide disabled children with services. However, Congress itself determined that the best way to ensure that children with disabilities receive a free appropriate public education is to require the State to evaluate the child in all areas of suspected disability. It clearly never intended to abrogate the State's historical authority in the area of education by permitting parents and their doctors to dictate to a school district what the child's educational program will entail.

The notion that Congress would permit a parent to force a public school district to provide a special education program based solely on the opinions of the parent and the parent's private physician is contrary to the statute and sound public policy. As the facts of this case so vividly demonstrate, granting parents such unilateral authority invites abuse of that power, such as when a parent scripts the doctor's letters and makes arbitrary determinations about what information she will, or will not, allow the school district to receive. It is patently unreasonable to require a school district to be responsible for a child's health and safety without allowing it to use qualified personnel of its own choosing to evaluate the scope of its responsibility.

CONCLUSION

For the above reasons, the Court should deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

JEFFREY L. ROGERS
FELDMAN & ROGERS, L.L.P.
5718 Westheimer, Suite 1200
Houston, Texas 77057
(713) 960-6000

Attorney for Respondent

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APPENDIX — LEGAL PROVISIONS INVOLVED

Federal Constitutional Provisions

U.S. CONST. amend XIV, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

20 U.S.C. § 1400

* * *

(d) Purposes

The purposes of this chapter are

> (1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and

independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

* * *

§ 1401. Definitions

(8) Free appropriate public education—

The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

Appendix

* * *

(11) Individualized education program

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title.

* * *

(22) Related services

The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

* * *

20 U.S.C. § 1412

(6) Procedural safeguards

(A) In general

Children with disabilities and their parents are afforded the procedural safeguards required by

section 1415 of this title.

(B) Additional procedural safeguards

Procedures to ensure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

* * * *

20 U.S.C. § 1414

§ 1414. Evaluations, eligibility determinations, individualized education programs, and educational placements

(a) Evaluations, parental consent, and reevaluations

(1) Initial evaluations

(A) In general

A State educational agency, other State agency, or local educational agency shall conduct

a full and individual initial evaluation, in accordance with this paragraph and subsection (b) of this section, before the initial provision of special education and related services to a child with a disability under this subchapter.

(B) Procedures

Such initial evaluation shall consist of procedures —

(i) to determine whether a child is a child with a disability (as defined in section 1401(3) of this title); and

(ii) to determine the educational needs of such a child.

(C) Parental consent

(i) In general

The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability as defined in section 1401(3)(A) or 1401(3)(B) of this title shall obtain an informed consent from the parent of such child before the evaluation is conducted. Parental consent for evaluation shall not be construed as

consent for placement for receipt of special education and related services.

(ii) Refusal

If the parents of such child refuse consent for the evaluation, the agency may continue to pursue an evaluation by utilizing the mediation and due process procedures under section 1415 of this title, except to the extent inconsistent with State law relating to parental consent.

(2) Reevaluations

A local educational agency shall ensure that a reevaluation of each child with a disability is conducted—

(A) if conditions warrant a reevaluation or if the child's parent or teacher requests a reevaluation, but at least once every 3 years; and

(B) in accordance with subsections (b) and (c) of this section.

(b) Evaluation procedures

(1) Notice

Appendix

The local educational agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 1415 of this title, that describes any evaluation procedures such agency proposes to conduct.

(2) Conduct of evaluation

In conducting the evaluation, the local educational agency shall —

(A) use a variety of assessment tools and strategies to gather relevant functional and developmental information, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general curriculum or, for preschool children, to participate in appropriate activities;

(B) not use any single procedure as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(3) Additional requirements

Each local educational agency shall ensure that —

(A) tests and other evaluation materials used to assess a child under this section —

(i) are selected and administered so as not to be discriminatory on a racial or cultural basis; and

(ii) are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so; and

(B) any standardized tests that are given to the child —

(i) have been validated

for the specific purpose for which they are used;

(ii) are administered by trained and knowledgable personnel; and

(iii) are administered in accordance with any instructions provided by the producer of such tests;

(C) the child is assessed in all areas of suspected disability; and

(D) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

(4) Determination of eligibility

Upon completion of the administration of assessments and other evaluation measures—

(A) the determination of whether the child is a child with a disability as defined in section 1401(3) of this title shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5); and

(B) a copy of the evaluation report and the documentation of determination of eligibility shall be given to the parent.

(5) Special rule for eligibility determination.

In making a determination of eligibility under paragraph (4)(A), a child shall not be determined to be a child with a disability if the determinant factor for such determination is lack of instruction in reading and math or limited English proficiency.

(c) Additional requirements for evaluation and reevaluations

(1) Review of existing evaluation data

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this section, the IEP Team described in subsection (d)(1)(B) of this section and other qualified professionals, as appropriate, shall —

(A) review existing evaluation data on the child, including evaluations and information provided by the parents of the child, current class-room-based assessments and observations, and teacher and related services providers observation; and

(B) on the basis of that review, and

input from the child's parents, identify what additional data, if any, are needed to determine—

> (i) whether the child has a particular category of disability, as described in section 1401(3) of this title, or, in case of a reevaluation of a child, whether the child continues to have such a disability;
>
> (ii) the present levels of performance and educational needs of the child;
>
> (iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and
>
> (iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child

and to participate, as appropriate, in the general education curriculum.

(2) Source of data

The local educational agency shall administer such tests and other evaluation materials as may be needed to produce the data identified by the IEP Team under paragraph (1)(B).

(3) Parental consent

Each local educational agency shall obtain informed parental consent, in accordance with subsection (a)(1)(C) of this section, prior to conducting any reevaluation of a child with a disability, except that such informed parental consent need not be obtained if the local educational agency can demonstrate that it had taken reasonable measures to obtain such consent and the child's parent has failed to respond.

(4) Requirements if additional data are not needed

If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, the local educational agency —

(A) shall notify the child's parents of —

(i) that determination and the reasons for it; and

(ii) the right of such parents to request an assessment to determine whether the child continues to be a child with a disability; and

(B) shall not be required to conduct such an assessment unless requested to by the child's parents.

(5) Evaluations before change in eligibility

A local educational agency shall evaluate a child with a disability in accordance with this section before determining that the child is no longer a child with a disability.

(d) Individualized education programs

(1) Definitions

As used in this chapter:

(A) Individualized education program

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised

in accordance with this section and that includes—

(i) a statement of the child's present levels of educational performance, including —

(I) how the child's disability affects the child's involvement and progress in the general education curriculum; or

(II) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;

(ii) a statement of measurable annual goals, including benchmarks or short-term objectives, related to —

(I) meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and

(II) meeting each of the child's other educational

needs that result from the child's disability;

(iii) a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child —

(I) to advance appropriately toward attaining the annual goals;

(II) to be involved and progress in the general curriculum in accordance with clause (i) and to participate in extracurricular and other nonacademic activities; and

(III) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this paragraph;

(iv) in explanation of the extent, if any, to which the child will not participate with nondisabled children in

the regular class and in the activities described in clause (iii);

(v)(I) a statement of any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in such assessment; and

(II) if the IEP Team determines that the child will not participate in a particular State or district-wide assessment of student achievement (or part of such an assessment), a statement of —

(aa) why that assessment is not appropriate for the child; and

(bb) how the child will be assessed;

(vi) the projected date for the beginning of the services and modifications described in clause (iii), and the anticipated frequency, location,

and duration of those services and modifications;

(vii)(I) beginning at age 14, and updated annually, a statement of the transition service needs of the child under the applicable components of the child's IEP that focuses on the child's courses of study (such as participation in advanced-placement courses or a vocational education program);

(II) beginning at age 16 (or younger, if determined appropriate by the IEP Team), a statement of needed transition services for the child, including, when appropriate, a statement of the interagency responsibilities or any needed linkages; and

(III) beginning at least one year before the child reaches the age of majority under State law, a statement that the child has been informed of his or her rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title; and

(viii) a statement of —

(I) how the child's progress toward

the annual goals described in clause (ii) will be measured; and

(II) how the child's parents will be regularly informed (by such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of —

(aa) their child's progress toward the annual goals described in clause (ii); and

(bb) the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

(B) Individualized education program team

The term "individualized education program team" or "IEP Team" means a group of individuals composed of—

(i) the parents of a child with a disability;

(ii) at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

(iii) at least one special education

teacher, or where appropriate, at least one special education provider of such child;

(iv) a representative of the local educational agency who —

(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(II) is knowledgeable about the general education curriculum; and

(III) is knowledgeable about the availability of resources of the local educational agency;

(v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);

(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related

services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability.

(2) Requirement that program be in effect

(A) In general

At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in its jurisdiction, an individualized education program, as defined in paragraph (1)(A).

(B) Program for child aged 3 through 5

In the case of a child with a disability aged 3 through 5 (or, at the discretion of the State education agency, a 2 year-old child[1] with a disability who will turn age 3 during the school year), an individualized family service plan that contains the material described in section 1436 of this title, and that is developed in accordance with this section, may serve as the IEP of the child if using that plan as the IEP is —

1. So in original. Probably should be "2-year-old".

(i) consistent with State policy; and

(ii) agreed to by the agency and the child's parents.

(3) Development of IEP

(A) In general

In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider —

(i) the strengths of the child and the concerns of the parents for enhancing the education of their child; and

(ii) the results of the initial evaluation or most recent evaluation of the child.

(B) Consideration of special factors

The IEP Team shall —

(i) in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior;

(ii) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP;

(iii) in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) consider whether the child requires assistive technology devices and services.

(C) Requirement with respect to regular education teacher

The regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel consistent with paragraph (1)(A)(iii)(IV).

(4) Review and revision of IEP

(A) In general

The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team—

(i) reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and

(ii) revises the IEP as appropriate to address—

(I) any lack of expected

progress toward the annual goals and in the general education curriculum, where appropriate;

(II) the results of any reevaluation conducted under this section;

(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B) of this section;

(IV) the child's anticipated needs; or

(V) other matters.

(B) Requirement with respect to regular education teacher

The regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the review and revision of the IEP of the child.

(5) Failure to meet transition objectives

If a participating agency, other than the local educational agency, fails to provide the transition

services described in the IEP in accordance with paragraph (1)(A)(vii), the local educational agency shall reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in that program.

(6) Children with disabilities in adult prisons

(A) In general

The following requirements shall not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(i) The requirements contained in section 1412(a)(17) of this title and paragraph (1)(A)(v) of this subsection (relating to participation of children with disabilities in general assessments).

(ii) The requirements of subclauses (I) and (II) of paragraph (1)(A)(vii) of this subsection (relating to transition planning and transition services), do not apply with respect to such children whose eligibility under this subchapter will end, because of their age, before they will be released from prison.

(B) Additional requirement

If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child's IEP Team may modify the child's IEP or placement notwithstanding the requirements of sections 1412(a)(5)(A) of this title and paragraph (d)(1)(A) of this section if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(e) Construction

Nothing in this section shall be construed to require the IEP Team to include information under one component of a child's IEP that is already contained under another component of such IEP.

(f) Educational placements

Each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

20 U.S.C. § 1415

§ 1415. Procedural safeguards

* * *

(b) Types of procedures

The procedures required by this section shall include—

(1) an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(2) procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child) to act as a surrogate for the parents;

(3) written prior notice to the parents of the child whenever such agency—

(A) proposes to initiate or change; or

(B) refuses to initiate or change;

the identification, evaluation, or educational placement of the child, in accordance with subsection (c) of this section,

or the provision of a free appropriate public education to the child;

* * *

(i) Administrative procedures

* * *

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

* * * *

34 C.F.R. § 300.24

§ 300.24 Related Services.

(a) General. As used in this part, the term related services means transportation and such

developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

* * * *

34 C.F.R. § 300.502

§ 300.502 Independent educational evaluation.

(a) General.

(1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (h) through (e) of this section.

(2) Each public agency shall provide to parents, upon request for an independent educational evaluation, information about where

an independent educational evaluation may he obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.

(3) For the purposes of this part—

(i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and

(ii) Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.301.

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

(i) Initiate a hearing under § 300.507 to

show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing under § 300.507 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the explanation by the parent may not be required and the public agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.

(c) Parent-initiated evaluations. If the parent obtains an independent educational evaluation at private expense, the results of the evaluation—

(1) Must he considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child;

and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) Requests for evaluations by hearing officers. If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) Agency criteria.

(1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must he the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

(2) Except for the criteria described in paragraph (e)(l) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

(Authority: 20 U.S.C. 1415(b)(1))

34 C.F.R. § 300.505

Appendix

§ 300.505 Parental consent.

(a) General.

(1) Subject to paragraphs (a)(3), (b) and (c) of this section, informed parent consent must be obtained before—

(i) Conducting an initial evaluation or reevaluation; and

(ii) Initial provision of special education and related services to a child with a disability.

(2) Consent for initial evaluation may not be construed as consent for initial placement described in paragraph (a)(l)(ii) of this section.

(3) Parental consent is not required before—

(i) Reviewing existing data as part of an evaluation or a reevaluation; or

(ii) Administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.

(b) Refusal. If the parents of a child with a disability refuse consent for initial evaluation or a reevaluation, the agency may continue to pursue those evaluations by using the due process procedures under §§ 300.507-300.509, or the mediation procedures under § 300.506 if appropriate, except to the extent inconsistent with State law relating to parental consent.

(c) Failure to respond to request for reevaluation.

(1) Informed parental consent need not be obtained for reevaluation if the pubic agency can demonstrate that it has taken reasonable measures to obtain that consent, and the child's parent has failed to respond.

(2) To meet the reasonable measures requirement in paragraph (c)(1) of this section, the public agency must use procedures consistent with those in § 300.345(d).

(d) Additional State consent requirements. In addition to the parental consent requirements described in paragraph (a) of this section, a State may require parental consent for other services and activities under this part if it ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.

(e) Limitation. A public agency may not use a parent's refusal to consent to one service or activity under paragraph (a) and (d) of this section to deny the parent or child any other service, benefit, or activity of the public agency, except as required by this part.

(Authority: 20 U.S.C. 1415(b)(3); 1414(a)(1)(C) and (c)(3))

34 C.F.R. § 300.507

§ 300.507 Impartial due process hearing; parent notice.

(a) General.

(1) A parent or a public agency may initiate a hearing on any of the matters described in § 300.503(5)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).

(2) When a hearing is initiated under paragraph (a)(1) of this section, the public agency shall inform the parents of the availability of mediation described in § 300.506.

(3) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if—

(i) The parent requests the information; or

(ii) The parent or the agency initiates a hearing under this section.

(b) Agency responsible for conducting hearing. The hearing described in paragraph (a) of this section must be conducted by the SEA or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the SEA.

(c) Parent notice to the public agency.

(1) General. The public agency must have procedures that require the parent of a child with a disability or the attorney representing the child, to

provide notice (which must remain confidential) to the public agency in a request for a hearing under paragraph (a)(1) of this section.

(2) Content of parent notice. The notice required in paragraph (c)(1) of this section must include—

(i) The name of the child;

(ii) The address of the residence of the child;

(iii) The name of the school the child is attending;

(iv) A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and

(v) A proposed resolution of the problem to the extent known and available to the parents at the time.

(3) Model form to assist parents. Each SEA shall develop a model form to assist parents in filing a request for due process that includes the information required in paragraphs (c)(1) and (2) of this section.

(4) Right to due process hearing. A public

agency may not deny or delay a parent's right to a due process hearing for failure to provide the notice required in paragraphs (c)(1) and (2) of this section.

(Authority: 24 U.S.C. 1415(b)(5), (b)(6), (b)(7), (b)(8), (e)(1) and (f)(1))

34 C.F.R. § 300.532

§ 300.532 Evaluation procedures.

Each public agency shall ensure, at a minimum, that the following requirements are met:

* * *

(g) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(h) In evaluating each child with a disability under §§ 300.531-300.536, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

* * * *

State Regulatory Provisions

Appendix

19 TEX. ADMIN. CODE § 89.1151(b).

(b) The Texas Education (TEA) shall implement a one-tier system of due process hearings under the IDEA. The proceedings in due process hearings shall be governed by the provisions of 34 CFR, §§ 300.507-300.514, and 34 CFR, § 300.528, if applicable, and §§ 89.1151, 89.1165, 89.1170, 89.1180, 89.1185 and 89.1191 of this subchapter.

Supreme Court, U.S.
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(3)

No. 06-438

IN THE

Supreme Court of the United States

SHELBY S., a minor by and through her Conservator and next friend, KATHLEEN T.,

Petitioners,

v.

CONROE INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

CAREN MORGAN CAMBRE
1300 Jefferson Street
Gretna, Louisiana 70053
(504) 251-4359

MARTIN J. CIRKIEL
Counsel of Record
CIRKIEL & ASSOCIATES, P.C.
1901 East Palm Valley Boulevard
Round Rock, Texas 78664
(512) 244-6658

Attorneys for Petitioners

204927

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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B. FEDERAL STATUTES

20 U.S.C. §1400 *et seq.* 1

INTRODUCTION

The Court should grant Petitioner's request for all the reasons noted in their original writ, most importantly that the issue addressed therein is one of constitutional proportion. Its proper consideration and adjudication affects the rights of all children with disabilities, and by extension their parents, throughout the United States. It is certainly an issue of important public policy that warrants due consideration.

Respondent's Brief in Opposition did not offer any significant or reasonable grounds of challenge to Petitioner's position and request. For instance, while Respondent has provided a number of reasons as to why Petitioner's request for *certiorari* should be denied, much of it is procedural and little of it substantive. In fact, to the extent Respondent has provided some substantive discussion arguing against consideration of Petitioner's writ, they fail to actually answer or adequately address the specific question that has been actually posed by Petitioner; i.e., when a school wishes to complete their own medical evaluation of a child, and the family chooses not give consent to the requested evaluation, may the school over-ride this parental decision by merely articulating reasonable grounds, or must the school demonstrate a more compelling interest to overcome the fundamental rights involved?

Respondent attempts to unfairly recharacterize Petitioner's position. They argue that all Petitioner really desires is the unilateral ability to dictate the educational placement and services of Shelby. That is incorrect. Shelby simply requests that this Honorable Court require the school district to give due weight to her constitutionally protected privacy rights and liberty interests including her right to bodily integrity.

Petitioner is not requesting unilateral authority but simply an equal say in the partnership contemplated by IDEA, 20 U.S.C. §1400 *et seq*. She desires that her rights, and the rights of other persons similarly situated, the constitutionally protected fundamental rights of privacy and by extension that of consent, be given full life and breath by this Court. This can only be done with a complete briefing on the issue.

Without such consideration and briefing, these fundamental rights, for persons who are the most disabled in our culture, and most in the need of our communal protection, become an empty promise. Certainly when children with special needs are mainstreamed into the regular education environment and learn about our shared great American values, and the absolutely unequaled protections noted in our Constitution, they must find that the Constitution values them and protects them as well. That can only occur if this Court gives them the opportunity to have their voice heard, their argument given due consideration, by and through the granting of this writ

ARGUMENT

A. COMMENT ON "QUESTION PRESENTED"

Respondent first attempts to re-characterize Petitioner's argument, and in doing so, redirect the Court away from the issue as originally presented. This re-characterization should be rejected. In their original writ, Petitioner posed the following query:

> "Is the correct standard of review a school district must meet to override parental consent and compel a child to undergo a medical examination that is potentially life-threatening, merely reasonable as the 5th Circuit has articulated, or must it be of a compelling interest, and provided in the least restrictive means, consistent with well-settled Supreme Court jurisprudence when construing issues relative to fundamental familial rights?"

Respondent responded with the following "Question Presented":

> "May a parent deny a school district the opportunity to evaluate the special education and related services a child needs under the Individuals With Disabilities Education Act and force it instead to provide the educational program the parent unilaterally determines to be appropriate?"

Let the Petitioner be unequivocally clear, it is not their belief, nor ever has it been their belief, that they have the ability to unilaterally determine Shelby's needs or educational

placement, nor has Petitioner attempted to determine any aspect of the educational program provided by the school. Petitioner seeks instead to ensure that Shelby's medical expert controls the medical regimen provided to the child at school. All along the procedural path of this case, Petitioner has argued that her voice, at the very (very) least, be given an opportunity to be realistically heard during the administrative process, so that the school's request for a medical evaluation not be a foregone conclusion, as (previously) required by *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176 (5th Cir. 1995), and as was very obviously the case when first heard by the Texas Special Education Hearing Officer.

Further, Petitioner has continually argued that if and when a school requests to complete a medical evaluation, especially one where there was evidence the evaluation could be dangerous to a child, copious detailed medical information was on file already, then at the very least, the requestor should be required to satisfy well-settled constitutional requirements, i.e, be of a compelling nature and be administered with the least restrictive manner. In all fairness, and up to this point, the only entity with the ultimate legal authority to do anything unilateral was the school district. IDEA contemplates an equal partnership between a parent and a school, not a unilateral power to either. The Court should grant this writ so that the issue as posed by Petitioner be given the full hearing that it rightfully deserves and reject Respndent's recharacterization of the issue.

B. THE RESPONSE BY THE SCHOOL DISTRICT IS FLAWED

The long-held belief by Hearing Officers in Texas, the Fifth Circuit and in various state educational agencies throughout the United States (though not all) was that a Hearing Officer had absolutely no discretion, none at all, but to grant a school's request to evaluate a child, if a parent did not provide the necessary consent to do so. *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176 (5th Cir. 1995). A review of the legal terrain since 1995 would note that an increasing number of Hearing Officers and State Educational Agencies have rejected, at least in part, the "no discretion" standard set forth in *Andress*. These

Hearing Officers and State Educational Agencies have deemed it crucial to the decision-making process to consider, for instance, whether the evaluation was medical in nature or one that was purely academic or educational; or whether or not the evaluation requested was actually necessary based upon the information already available to the parties and most importantly, if the evaluation requested could be harmful to the child.

At the District Court and later at the Fifth Circuit, Petitioner argued first, that a Hearing Officer should have discretion to determine, based upon the facts, and for instance, those considerations noted above, whether or not the evaluation requested was actually warranted. Petitioner also argued that any decision to over-ride a parent's consent must consider her fundamental constitutional rights relative to familial privacy and integrity, and by logical extension, the ability of her next friend to effectuate such rights.

In their decision, the Fifth Circuit panel never specifically mentioned *Andress*, but did clarify that the "no discretion" standard was not exactly correct. They stated that "where a school district articulates reasonable grounds for its necessity to conduct a medical reevaluation of a student, a lack of parental consent will not bar it from doing so." *Shelby S. b/n/f Kathleen T. v. Conroe Indep. Sch. Dist.*, 454 F.3d 450 (5th Cir 2006). Without specifically saying so, the Fifth Circuit obviously agreed with Petitioner that the "no discretion" standard was suspect, and that a Hearing Officers does in fact have not only have the discretion to make a decision, but the duty to assure, based upon language in the decision, that at the very least the request was reasonable.

The Panel also considered, but nevertheless rejected, Shelby's claim that ordering a medical evaluation without consent violated her right to privacy. The Court also found that the requested evaluation and procedures, without further discussion, were not "constitutionally problematic." *Id.* Shelby, by and through her next friend, disagreed. She now asks that this Supreme Court issue a writ and consider whether or not the requested evaluation was fact, constitutionally

problematic and whether the "reasonableness" standard espoused therein, was infirm.

Shelby believes this "reasonableness standard," while certainly more cognizant of her rights than the previous "no discretion" standard, nevertheless is still constitutionally problematic. Specifically, every other child, in every other context where a medical evaluation is contemplated, has a significant right of privacy and of bodily integrity.

Respondent alleges that Petitioner believes her rights are absolute, and that she has unilateral authority to rely upon outside evaluations, and set her own educational course. That is not correct. Petitioner is not concerned with educational issues; Petitioner is concerned with medical issues. Shelby's eligibility is not at issue, nor are any educational issues dealing with Shelby's program at school. Petitioner recognizes that her right to make medical decisions for Shelby is tempered by and subject to the state's interest. She merely believes that the state's interest should be compelling. Why should Shelby's rights, and of those children similarly situated, be lost when they reach the steps of the schoolhouse. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969). While Respondent's brief answers many questions, it does not answer this one.

1. Respondent's Substantive Arguments Are Without Merit

Respondent cites *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 699 (10th Cir. 1998) for the proposition that "parents simply do not have the right to control each and every aspect of their children's education and oust the state's authority over that subject." Petitioner agrees with this general theory but once again, urges that an intrusive medical evaluation, one that could be harmful to the child, is not of the same character or consideration noted in the *Swanson* case [when a school wants to evaluate a child being home-schooled due to parent's religious concerns, the first amendments *free-exercise clause* is not triggered, so that no compelling state interest is required].

The other cases cited by Respondent in support of their proposition that the medical evaluation in question does not infringe upon Shelby's or Ms. T.'s constitutional rights,

likewise do not specifically address Petitioner's question about medical evaluations,[1] especially when the proposed examination could be harmful to the child. Respondent asks this Court to look to *Blau v. Fort Thomas Public School Dist.*, 401 F.3d 381 (6th Cir. 2005) in support of the proposition that Petitioner has no justiciable rights in the medical context noted, but *Blau's* silence on particular issues actually supports Petitioner's position

Blau correctly noted that in regard to a school dress code, as well "in the curriculum, the hours of the school day, the timing and context of examinations, the individuals hired to teach at the school, the extra-curricula activities offered at the school," there are no fundamental rights triggered. Nevertheless, that Court did not address, nor were they asked, whether such rights do exist in regard to a medical evaluation. In *Boone v. Boozeman*, 217 F. Supp. 2d 938 (E.D. Ark. 2002), also cited by Respondent, there are certain medical issues discussed, but unlike *Blau, Boone* actually supports Petitioner's position for what it does say.

In *Boone*, the Court noted that a school has the right to immunize a child over the objection of a parent, even when based upon the establishment clause of the First Amendment, because the school has a (compelling) duty and interest in protecting other children against the spreading of disease. The Court wisely noted that their decision could be different if the vaccine was "specifically medically contra-indicated" for the child. *Id.* at 956, fn. #41. In such an instance, the child's fundamental rights would find protection under a blanket

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1. *M.T.V. v. DeKalb County Sch. Dist.*, 446 F.3d 1153 (11th Cir. 2006) [parent wanted reimbursement for certain services but would not permit school to perform a statutorily mandated re-evaluation, school had absolutely no information to make a decision upon]; *Johnson v. Duneland Sch. Corp.*, 92 F.3d 554 (7th 1996) [child's treating physician was in favor of the evaluation but the parents's still refused]; *Dubois v. Conn. State Bd. Of Ed.*, 727 F.2d 44 (2nd Cir. 1984) [parent wanted reimbursement from school for certain services but refused to permit evaluation]; *Murphy v. State of Arkansas*, 852 F.2d 1039 (8th Cir. 1988) [no fundamental rights triggered in home-school situation]; *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994) and *Mozert v. Hawkins County Bd. Of Educ.*, 827 F.2d 1058 (6th Cir. 1987), cert denied, 484 U.S. 1066 [no fundamental rights based upon "free exercise" clause of First Amendment in reading program].

woven with the clothe of a liberty interest. The reasoning in *Boone* and its relevance to the instant case is telling. First, the effect of the provision or failure to provide a medical evaluation on Shelby would have no effect upon other students, unlike the vaccination issue. Second, and even more importantly, there is significant evidence that the evaluation contemplated by the Respondent school district is in fact, "specifically medically contra-indicated" for Shelby. As such, not only should her fundamental rights be given full respect, but the state should be required to show a compelling reason to overcome such medical contra-indication. Further, the projected outcome of the evaluation, a medical regime or prescription for Shelby's healthcare at school devised by the school's doctor to replace the prescription provided by Shelby's own doctor produces a result that should shock the conscience, i.e. overturning the right to determine what is to be done or not done with one's own body that is at the base of human liberties.

2. A Brief Comment On The Facts

Petitioner first notes that Respondent does not apparently disagree with her assertion that the evaluation requested was purely medical in nature.[2] As previously discussed herein, medical evaluations pursuant to IDEA take on a different character and legal analysis, than those solely related to education concerns.

Respondent comments that the "material facts are not in dispute (Resp. at p. 2)." Petitioner agrees and wishes it had been left "as is." Nevertheless Respondent goes on to describe certain "misstatements of fact (Resp. at p. 5)," giving rise to certain inappropriate "implications" or "assertions." Petitioner does not believe that she has provided any facts that have any untoward or inappropriate "implications" or

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2. In IDEA, the term "medical services" refers only to services that must be performed by a physician, *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 73 (1999). When Respondent recognized that only Clarke, a physician, could perform the evaluation, then the normal legal analysis used when construing an educational issue, *see, Bd. Of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 179 (1982), gave way and a different analysis should have been used, as different rights and remedies were involved.

"assertions," as Respondent professes. This case simply involves an issue where reasonable minds may reasonably differ. There is no attempt or desire to mislead, but rather a desire to have a full and fair adjudication of this important issue.

In addition, Respondent comments that Petitioner has argued or intimated the Hearing Officer was biased at to her. Petitioner has never argued (nor could she) that the decision made by the Hearing Officer was based upon bias, personal animus, unethical or some other inappropriate human factor. Rather, Petitioner has argued at every step along the way that the various comments made by the Hearing Officer during the due process hearing provide evidence, not of bias, but the belief held by Hearing Officer that he had no discretion to make a decision, other than to grant the school's request to perform their own medical evaluation of the child. The inability to have any discretion was one of the material issues at the appellate stage.

Respondent further comments that Petitioner has attempted to present evidence establishing that the District's expert, Dr. Gary Clark, M.D. could not safely evaluate Shelby. In the presentation of her factual resume, Petitioner wanted the Court to be aware that her physician, Dr. Dorothy Kelly, M.D., believed otherwise. As the case at the District Court was dismissed at the summary judgement stage, Petitioner believes it is important that this contested issue of material fact be brought forward again, and at this time, particularly in light of the fact Respondent does not disagree with Petitioner's assertion that the evaluation requested by the school could have harmful results upon Shelby.

Petitioner asks this Court to note that the Hearing Officer never made a determination or finding of fact, or any commentary at all, on whether or not Clark could perform the evaluation safely.

C. THE SCHOOL DISTRICT'S WAIVER ARGUMENT IS WITHOUT MERIT

First and foremost, Respondent's argument should be rejected because it totally misconstrues the nature of Shelby's argument. The issue as posed by the real party in interest,

Petitioner Shelby S., is whether or not the school has demonstrated a sufficiently compelling interest to perform a medical evaluation against her will; a position that can only be given a legal voice and constitutional protection, through her next friend. The rights we are speaking about only exist in the context of the parent-child relationship, they are not and cannot be devoid of each other. Respondent's argument that Petitioner's writ has somehow only brought forward claims that solely speak to the individual rights of Kathleen T., and not of the actual right of Shelby S., is quite frankly, misguided. In short, Kathleen T.'s rights are derivative and only exist upon Shelby's right to be free from an unwarranted intrusion upon her bodily privacy. In any case, Respondent was clearly on notice as to any and all of these issues. *United States v. Glover*, 242 F.3d. 333, 336 (6th Cir. 2001).

D. RESPONDENT HAS WAIVED ANY CLAIM REGARDING THE CAPACITY ISSUE

In any case, Respondent has waived the very claim they argue about. At the District Court stage, Shelby argued that she, by and through her grandmother Kathleen T., and solely as next friend, had a constitutionally protected, and fundamental right, regarding this consent issue. At that stage, Respondent made absolutely no comment distinguishing as to whether this contended right was brought by Shelby through her parent's capacity as next friend, or alternatively, whether or not her parent was bringing the claim in any individual capacity.

At the Fifth Circuit stage, Shelby again argued that she, by and through her parent Kathleen T., and as next friend, had a constitutionally protected, and fundamental right, regarding this privacy issue. At that stage, Respondent again made absolutely no argument or comment distinguishing as to whether this contended right was brought by Shelby through her parent's capacity as next friend, or alternatively, whether or not her parent was bringing the claim in any individual capacity.

In her Fifth Circuit brief, when mentioning who the real parties in interest are, it specifically states that Shelby S. is one party and that Kathleen T. is a party only as "Next Friend Of

Appellant." There is no mention of any claims in Kathleen T.'s individual capacity. When Petitioner made that constitutional argument in that brief, as she has made in this one, Respondent did not object. Respondent now argues that "it is apparent (emphasis added) that the Fifth Circuit found that Kathleen T. had not properly perfected an appeal in her individual capacity because it did not address her claims."

This is not a correct assessment of the Fifth Circuit's opinion. The Court specifically states, and in regard to the issue at hand, that it "was not constitutionally problematic." The Court very definitely did address the constitutional claim. Respondent is incorrect, that the language in the 5th Circuit's opinion, somehow, "apparently" supports their waiver argument. It does the opposite, it disproves it.

SUMMARY AND CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

MARTIN J. CIRKIEL
Counsel of Record
CIRKIEL & ASSOCIATES, P.C.
1901 East Palm Valley Boulevard
Round Rock, Texas 78664
(512) 244-6658

CAREN MORGAN CAMBRE
1300 Jefferson Street
Gretna, Louisiana 70053
(504) 251-4359

Counsel for Petitioners